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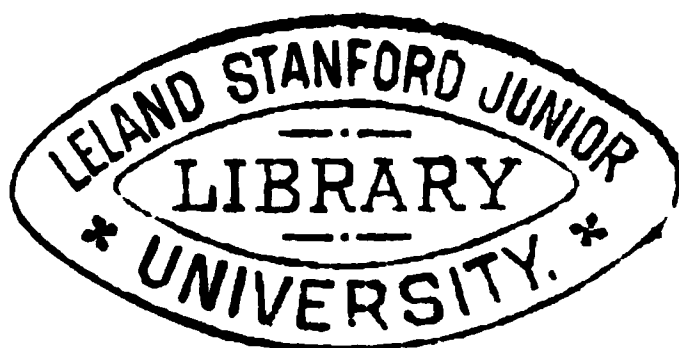
THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

EDITED BY LAWRENCE LEWIS, JR.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND

VOL. XVI

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LOUISVILLE AND N. R. Co. v. RAILROAD COMMISSION OF TENNESSEE.
EAST TENNESSEE, V. AND G. R. Co. v. SAME.

(Advance Case, U. S. Circuit Court, M. D. Tennessee. February 29, 1884.)

Railroads having been created mainly for the accommodation of the public, and to facilitate the business of the country, and being indispensable to the rapid and cheap transportation of commodities, are subject to legislative control within the limits of State and federal constitutional restrictions, and may be required by law to refrain from so using their property as to injure others, and by appropriate pains and penalties may be restrained from unjust discrimination and extortionate charges, compelled to observe precautionary measures against accident, and in other ways regulated for the public welfare.

But the legislation adopted must observe the contract rights of corporations under their charters; must be confined to the exercise of the police power, and not interfere with the vested rights of the companies in their property or franchises; must not inflict punishment or take property otherwise than by due process of law nor without compensation; must not deny to them the equal protection of the law; and must in all respects observe the constitutional guaranties prescribed for the protection of all citizens—railroad companies being for such purposes as much citizens as natural persons.

The act of the general assembly of Tennessee of March 30, 1883, to establish a railroad commission analyzed, and *held* to be invalid because its provisions are too indefinite, vague, and uncertain to sustain a suit for the penalties imposed, and do not sufficiently define the offences therein declared. It leaves to the jury to say whether, upon the proof, the difference in rates amounted to discrimination, or whether the charges were unjust and unreasonable, thus making the guilt or innocence of the accused depend upon the finding of a jury, and not upon a construction of the act. It relegates the administration of the law to the unrestrained discretion of the jury, and there could be therefore no reasonable approximation to uniform results, but verdicts would be as variant as their prejudices, and inevitably lead to inequalities and injustice.

Neither is the objection to the act for uncertainty removed by its attempt to prescribe a standard of compensation for the guidance of the jury. It does not with precision point out the assessment for taxation which is to furnish the basis of judgment, nor prescribe the rule under which the net earnings are to be computed. But if these difficulties were overcome, there remains no method of measuring what is a "fair and just return" on the value of the property of the companies which they are allowed to earn before becoming liable to the penalties of the statute, but the act leaves it to the unqualified discretion of the jury, whose verdicts may vary not only as between different companies, but as between different suits with the same company. One jury may fix it at one rate per cent, and others at different rates, so that no company could tell whether it was violating the law or not, and the fact would be determined by the fluctuating contingencies of busi-

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ness, and a charge made on the calculation that 6 per cent would be fair, might, by the verdict of a jury, upon facts transpiring subsequent to the alleged violation, be pronounced unreasonable and unjust. The legislature cannot delegate such power to a jury without a practical confiscation of the citizen's property.

The act violates the eighth section of the eleventh article of the State constitution and the fourteenth amendment of the constitution of the United States. It discriminates against railroad corporations, in its third and thirteenth sections, by imposing upon them penalties in favor of the State, which are not imposed for like offenses or conduct upon other persons operating railroads in the State, although the act professes to regulate both. It also, in the twenty-ninth section, discriminates in favor of roads not completed, or the construction of which has not commenced, by exempting them from regulation and punishment for ten years. The act also reverses the presumption of innocence, and substitutes one of guilt, to be removed only by the accused proving innocence, and puts the power to raise this presumption in the hands of three commissioners, who can, by their act, place the burden on the accused, or leave it off, and arms them with authority to enforce their decree by imposing penalties, which may amount to the taking of private property without compensation. Besides, it enables a political party to bring to its aid the immense railroad property and influence, by action through the commissioners, which shall be friendly or unfriendly, as the railroad companies favor one party or the other.

The act of the Tennessee legislature, approved March 30, 1833, c. 199, entitled, "An act to provide for the regulation of railroad companies and persons operating railroads in this State, to prevent discrimination upon railroads in this State, and to provide for the punishment of the same, and to appoint a railroad commission," is invalid so far as it applies to the plaintiffs in these cases, because it is a regulation of inter-State commerce, acting directly, by a control of the rates of compensation, upon the transportation of persons and commodities in transit from one State into another. The States have surrendered the power to do this by the federal constitution, art. 1, § 8, which confers on Congress the exclusive power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The power of the States to regulate railroad rates by such direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a State, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging State authority, be held to include so much of a transportation on a continuous shipment between two or more States as will cover the distance travelled within the limits of any one of those States; for this construction would utterly destroy the exclusive power of Congress over the inter-State transportation, abrogate the constitutional provision, and enable the States to restrict, obstruct, or impair that freedom of commerce between the States which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the State, or else it may be to shipments beginning and ending in the State, without reference to the character of the road in that regard. This is the utmost reach of State power, and, as to this, no decision is now made, because the act itself makes no discrimination, and attempts to control all rates.

Until Congress chooses to exercise whatever power it may have over domestic commerce, as above described, by reason of any relation it may bear to inter-State commerce as an auxiliary or instrumentality thereof, the States may continue their control over it as over any other such instrumentality within their territorial limits, although the inter-State commerce of

which it is an instrumentality may be indirectly or incidentally affected by such control, but they can never touch the inter-State commerce itself by direct action upon it or any part of it, by these regulations, and any State law, be it wise or unwise, valid or invalid in other respects, and no matter what its character or the necessity for such a law may be, which acts upon the contract between the carrier and shipper for inter-State transportation to regulate the charges for it, or any part of it, or the conditions thereof in any respect, operates directly on the commerce itself, of which the transportation is certainly a part, and not on an instrumentality of it. These distinctions must be observed in legislation, and that which neglects or overlooks them, or assumes to disregard them, is necessarily invalid; and the courts cannot cure the defect by supplying through judicial decree the necessary qualifications to conform the legislation to constitutional limitations.

It is as impossible for a State to make a regulation of inter-State commerce by the exercise of its power over the corporations of its creation as by any other power, if it permits them to engage in inter-State commerce. Possibly, it may bind the corporations permitted to engage in inter-State commerce to schedules of rates agreed upon by them; but this is binding only by force of the contract of the carrier to be so bound, and not as a regulation of the rates under any municipal power of the States over the commerce. A regulation of inter-State commerce, as such, is as invalid in a charter as elsewhere in a State statute.

The Louisville & Nashville R. R. Co., being a Kentucky corporation, was authorized by license of the laws of Tennessee to extend its road into that state; and, subsequently, by laws passed for the purpose, to consolidate with other railroad companies, and thereby became an extensive system of intercommunication between the States from the Ohio river to the Gulf of Mexico. The East Tennessee, Virginia & Georgia R. R. Co., a Tennessee corporation, by authority of law, became a consolidated corporation, operating a system of railroads between the States and extending through Tennessee into Georgia, Alabama, and Mississippi, forming with its connections a united line of intercommunication, traversing North and South Carolina, Virginia, and other States. *Held*, that an act of the legislature which attempts to control the rates for fares and freights of persons and commodities passing over these roads from one State into another, on the theory of regulating the charges for the distances travelled within the State of Tennessee, is invalid as a regulation of inter-State commerce, and the railroad commissioners will be enjoined from executing it as to these roads.

APPLICATION for Preliminary Injunction.

The Louisville & Nashville R. R. Co. filed its bill alleging that it was a Kentucky corporation, extending its road into the State of Tennessee by authority of the laws of the latter State; that by other laws passed for the purpose it had been authorized to acquire and to consolidate with other roads extending into neighboring States; that by its charter, and the charters of the other roads so acquired by it, there were fixed certain maximum rates of charges for transportation, which conferred a contract right to establish its own rates within the maximum, which had not been exceeded by it. The East Tennessee, Virginia & Georgia R. R. Co., by its bill, alleged that it was a Tennessee corporation, authorized by law to consolidate its roads with others, and operating a system of roads extending into neighboring States, and that by its charter there were fixed certain maximum rates which conferred upon it

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the contract right to establish its own rates within the maximum, and which it had not exceeded. Both bills alleged that the defendants had been appointed railroad commissioners, and were assuming to act by authority claimed under the act of the general assembly of the State of Tennessee, approved March 30, 1883, which is as follows:

“Chapter CXCIX.

“RAILROAD COMMISSION BILL.

“A bill to be entitled ‘An Act to provide for the regulation of railroad companies, and persons operating railroads in this State; to prevent discrimination upon railroads in this State; and to provide for the punishment for the same; and to appoint a railroad commission.’

“SECTION 1. Be it enacted by the general assembly of the State of Tennessee, that the main track and all the branches of every railroad in this State is a public highway, over which all persons have equal rights of transportation for passengers and freights, on the payment of just and reasonable compensation to the owner of the railroad for such transportation; and any person or corporation engaged in the business of transporting passengers or freights over any railroad in this State who shall exact and receive for any such transportation more than just and reasonable compensation for the services rendered, or demand more than the rates specified in any bill of lading issued by such person or corporation, or who for his or its advantage, or for the advantage of any connecting line, or of any person or locality, shall make any unjust and unreasonable discrimination in transportation against any individual, locality, or corporation, shall be guilty of extortion, and in every case it shall be for the jury to determine from all the evidence whether more than just and reasonable compensation was exacted and received, or whether any such discrimination in transportation, which may be established by the evidence, against the individual, locality, or corporation, as the case may be, was made for the benefit or advantage of the person or corporation operating such railroad, or of any person or locality: provided, that nothing in this act shall be construed to prevent contracts for special rates for the purpose of developing any industrial enterprise, or to prevent the execution of any contract now existing.

“SEC. 2. Be it further enacted, that the party injured may recover of the person or corporation guilty of extortion, as defined in this act, ten times the amount of damages sustained by the overcharge or unjust discrimination, as the case may be, and a reasonable fee for the counsel prosecuting the case in any court having jurisdiction of the amount, in any county where the person or corporation operating the railroad does business; but if it appears that the service in which the extortion was committed was done at rates

or upon terms previously approved by the railroad commission hereinafter established, only actual damages, and no attorney's fee, shall be recovered.

"Sec. 3. Be it further enacted, that it shall be the duty of the commission to investigate and determine whether the provisions of this bill have been violated; and whenever said commissioners shall become satisfied that any railroad corporation has violated any of the provisions of this act, they shall immediately cause suit or suits to be commenced and prosecuted against any railroad corporation guilty of such violation in any court having jurisdiction of the subject-matter. Said suit shall be prosecuted in the name of the State of Tennessee, and conducted by the attorney-general of the judicial circuit in which the same is instituted, under the direction of said commissioners, and no suit so instituted shall be dismissed without their consent. All moneys so collected shall be paid into the State Treasury. If upon the trial of any cause for the recovery of the penalties provided in this bill, the jury shall find for the State, they shall assess and return with their verdict the amount of the penalty to be imposed on the defendant at any amount not less than \$100, nor more than \$1000, and the court shall render judgment accordingly.

"Sec. 4. Be it further enacted, that in all suits or proceedings under this statute the defendant may give in evidence the fact that the rates or terms in respect to which extortion is alleged had been previously approved by the railroad commission hereinafter established, and such approval shall be prima facie evidence that such rates or terms were not extortionate.

"Sec. 5. Be it further enacted, that no rates or charges for service in the transportation of freight over any railroad shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings of such railroad transporting freight, if done without such discrimination on the basis of such rate or charge, together with the net earnings from its passenger and other traffic, would not amount to more than a fair and just return on the value of which such railroads with its appurtenances and equipments to be assessed for taxation.

"Sec. 6. Be it further enacted, that all actions to recover damages under this act shall be commenced within six months after the cause of action accrues.

"Sec. 7. Be it further enacted, that the foregoing sections of this act shall not take effect until the first day of July, 1883.

"Sec. 8. Be it further enacted, that it shall be the duty of all persons or corporations in this State, who shall own or operate any railroad therein, to publish by posting at all the depots the tariffs of rates, which have been approved by said commission for transporting freights, showing the rates for each class, including gene-

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ral and special rates, and it shall be unlawful for such person or corporation to make any reduction or rebate from such tariff in favor of any person or corporation which shall not be made in favor of all other persons or corporations by a change in such published rates.

“Sec. 9. Be it further enacted, that it shall be unlawful and within the prohibition of this act for any railroad corporation doing business in this State, to make any contract, agreement, or arrangement with any other railroad corporation, or with any common carrier by water in respect to the transportation of freights of any description, from any place within this State by which it is to transport only a certain portion of such freights, or by which it is to refuse to transport such freights or any portion thereof, or by which any common carrier by water is to refuse to transport such freights or any portion thereof, or by which it is to receive any sum of money, or anything of value for not transporting all or any part of such freights, or by which it is to pay any sum of money, or part with anything of value as an inducement to any other railroad corporation or common carrier by water not to compete with it in the transportation of such freights, or by which it and other railroad corporations or common carrier by water, distribute among themselves for transportation, according to percentages, any freights offered for shipment; and railroad corporations are required to remove freights when delivered or offered for shipment to the extent of their facilities without unnecessary delay and without regard to any contract, agreement, or arrangement expressed or implied as aforesaid, and all railroad corporations refusing or neglecting so to do are hereby declared to be subject to the penalties imposed by this act.

“Sec. 10. Be it further enacted, that this act shall not prevent any railroad company from transporting freight free of charge, provided it is not done to evade the provisions of this act.

“Sec. 11. Be it further enacted, that it shall be the duty of the governor to nominate three competent persons, one from each grand division of the State, subject to the confirmation of the senate if in session, who shall constitute the railroad commission of the State of Tennessee, and the commissioners, after qualifying, as prescribed in section 11 of this act, shall proceed to elect one of their number as president and one as secretary; and said commissioners shall hold their offices until the first day of January, 1885, and their successors shall be elected by the qualified voters of the State at the November election, 1884, and every two years thereafter.

“Sec. 12. Be it further enacted, that the said railroad commissioners shall be State officers, and before entering on their duties shall take the oath of office prescribed for other State officers, and may be impeached and removed from office for the same causes, and in the same manner, as other State officers. They shall hold

office for two years and until their successors respectively are duly elected or appointed and qualified, and any vacancy shall be filled by the governor; the person so appointed shall hold office until his successor is duly appointed, confirmed, and qualified as above provided. No person in the employ of any railroad corporation, or other person, owning or operating a railroad in this State, or owning any stock in any railroad corporation, shall be nominated by the governor as a member of such commission, and any commissioner who shall accept any gift, gratuity, or emolument, or employment from any person or corporation owning or operating a railroad in this State, during his continuance in office, except a permit for himself to pass over the railroad of such person or corporation, shall forfeit his office, and may be impeached and removed from office for that cause, as well as any of the causes specified by law for the impeachment of other State officers.

“Sec. 13. Be it further enacted, that it shall be the duty of the commission to consider and carefully revise all tariffs of charges for transportation of any person or corporation owning or operating a railroad in this State, and if, in the judgment of the commission, any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charges amount to unjust and unreasonable discrimination against any person, locality, or corporation, the commission shall notify the person or corporation of the changes necessary to reduce the rate of charges to just and reasonable compensation, and to avoid unjust and unreasonable discrimination; when such changes are made or when none are deemed proper and expedient, the members of the commission shall append a certificate of its approval to such tariff or charges, and in case such change shall not be made, or if any charge subsequently made shall not conform thereto, said corporation shall be held *prima facie* guilty of extortion.

“Sec. 14. Be it further enacted, that it shall be the duty of said commission to hear all complaints made by any person against any such tariff or rates so approved, on the ground that the same in any respect is for more than just and reasonable compensation, or that such charges, or any of them, amount to or operate so as to effect unjust and unreasonable discrimination, such complaint must be in writing and specify the items in the tariff against which complaint is made, and if it appears to the commission that there may be justice in the complaint, or that the matters ought to be investigated, the commission shall forthwith furnish to the person or corporation operating the railroads, a copy of the complaint, together with notice that, at a time and place stated in the notice, the tariff as to said items will be revised by the commission, and at such time and place it shall be the duty of the commission to hear the parties to the controversy, or by counsel, and such evidence as may be offered, oral or in writing, and may examine witnesses on oath,

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conforming to the mode of proceedings as nearly as may be convenient to that required of arbitrators, giving such time and latitude to each side, and regulating the opening and conclusion of any argument as the commission may consider best adapted to arrive at the truth, and when the hearing is concluded, the commission shall give notice of any changes deemed proper by them to be made, to the person or corporation operating the railroad. And any subsequent charge higher than the amount fixed shall be prima facie evidence of extortion. And all railroad companies or persons operating railroads in this State shall make out and deliver for revision to the commissioners a schedule of their rates of charges for the transportation of freights, cars, and passengers, within twenty days after the president or superintendent is notified by the commissioners that they are ready to consider the same, and on failure to do so, said railroad company, or other persons so operating said railroad, shall be liable to a fine of \$100 for every day of said failure after the expiration of said twenty days; and said railroad company or other persons operating any railroad shall have the right to appear and make such proof as they may desire in regard to revision by said commissioners, under such regulations as the commissioners may prescribe.

“Sec. 15. Be it further enacted, that said commission shall have an office at the capital, and shall meet there on the first Monday in every month, and shall remain in session until all business before them is disposed of; and shall hold other sessions at such times and places as may be necessary for the proper discharge of their duties, or as the convenience of parties in the judgment of the commission may require. The members of said commission shall each receive a salary of two thousand dollars, unless restrained by law from the performance of their duties, to be paid as the salaries of the other State officers. It shall be the duty of the commission to keep a record of all its proceedings, which shall be open at all times to the inspection of the public.

“Sec. 16. Be it further enacted, that all money paid out under this act shall be paid on warrant of the comptroller to the treasurer, as by law provided, including such sum as may be necessary to procure office furniture, stationery, and other office expenses, including rent of office of said commission: provided that such office expenses shall not exceed five hundred dollars per annum.

“Sec. 17. Be it further enacted, that whenever, in the judgment of the railroad commission, it shall appear that repairs are necessary upon any such railroad, or that any addition to the rolling stock, or any addition to or change of the station or station-houses, or any change in the rates of fares for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the pub-

lic, they shall give information in writing to the corporation of the improvements and changes which they adjudge to be proper, and a report of the proceedings shall be included in the annual report of the commission to the legislature.

“Sec. 18. Be it further enacted, that the said commissioners shall have the right to pass free of charge in the performance of their duties on all the railroads in this State. That said commissioners shall have general supervision over all the railroads of Tennessee, and shall examine the same from time to time, and keep themselves informed as to their condition, and the manner in which they are operated with reference to the security and accommodation of the public, and the compliance of the several corporations with their charters and the laws of the State.

“Sec. 19. Be it further enacted, that said commission shall, as often as they deem it necessary, examine the several railroads in this State, and shall recommend in writing to the several railroad companies, or any of them, from time to time, the adoption of such measures and regulations as said commissioners deem conducive to the public safety and interest.

“Sec. 20. Be it further enacted, that the managers operating the several railroads of this State shall furnish the said commission with all the information required, relative to the management of their respective lines, and particularly with copies of all leases, contracts, and agreements for transportation, with express, sleeping-car, or other companies, to which they are parties, with schedules of tariff rates.

“Sec. 21. Be it further enacted, that the several railroad companies, trustees, or receivers, or other persons operating railroads in this State, be and are hereby required to make annual returns of their business to the board of commissioners on or before the first day of September of each year, made up to the close of business on the thirtieth day of June next preceding, which annual returns shall be made in duplicate in the manner prescribed by said commissioners, upon the blank forms to be furnished by said commissioners to said railroad companies. Any railroad company which shall neglect or refuse to make such terms shall forfeit to the State \$100 for each day of such refusal or neglect.

“Sec. 22. Be it further enacted, that every railroad company shall, within twenty-four hours after the occurrence of any accident to a train, attended with serious personal injury, on any portion of its line within the limits of the State, give notice of the same to the railroad commissioners, who, upon receiving such notice, or upon public rumor of such accident, may repair or dispatch one or more of their number to the scene of said accident, and inquire into the facts and circumstances thereof, which shall be recorded in the minutes of their proceedings, and embraced in their annual report.

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“Sec. 23. Be it further enacted, that the said commissioners may summon and examine, under oath, such witnesses as they may think proper in relation to the affairs of any railroad company.

“Sec. 24. Be it further enacted, that the board, through their chairman, shall make annual reports to the governor, on or before the first day of December in each year, for transmission to the legislature, of their doings for the year ending on the thirtieth day of June next preceding, containing such facts as will disclose the actual workings of the railway system in this State, and such suggestions as to the general railroad policy of the State as may seem to them appropriate. They shall also submit such recommendations for further legislation upon the subjects of railroads as they may deem necessary or advisable for the interests of the State.

“Sec. 25. Be it further enacted, that the railroad commissioners shall have at all times access to the list of stockholders of every corporation operating a railroad in this State, and may, in their discretion, at any time, cause the same to be copied in whole or in part for their own information, or for the information of persons owning stock in such corporations.

“Sec. 26. Be it further enacted, that it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other States of the Union, and with such persons from States having no railroad commissioners as the governor of such States may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each State, which shall secure such uniform control of railroad transportation in the several States, and from one State into or through another State, as will best subserve the interest of trade and commerce of the whole country; and said commission shall include in their annual report to the governor an abstract of the proceedings of any such conference or convention.

“Sec. 27. Be it further enacted, that no person holding the office of railroad commissioner shall, during his continuance in office, personally, or through any partner or agent, render any professional services, or make or perform any business contracts with or for any railroad owned or operated in this State, excepting contracts made with such railroad in its capacity as common carrier.

“Sec. 28. Be it further enacted, that nothing in this act contained shall be constructed to affect in any manner or degree the legal duties, rights, and obligations of any railroad corporation or other person owning or operating any railroad in this State, or its legal liability for the consequences of its neglect or mismanagement, whether adjudged by said commission to be reasonable, expedient, and proper, or not.

“Sec. 29. Be it further enacted, that none of the provisions of this act shall apply to any railroad now being constructed, or which

may hereafter be begun and constructed, in this State, until ten years from and after the completion of such new railroad.

“Sec. 30. Be it further enacted, that witnesses summoned to appear before said commission shall be entitled to the same per diem and mileage as witnesses attending the circuit court. Witnesses summoned by the commissioners shall be paid by warrant on the treasury, to be drawn by the comptroller on the certificate of the president of the board, of the amount to which such witness is entitled; witnesses summoned by any party, to be paid by the party by whom they are summoned. And the commissioners are hereby clothed with the same power to enforce the attendance of witnesses as is now possessed by any court of record.

“Sec. 31. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

“Passed March 29, 1883. W. L. LEDGERWOOD,
“Speaker of the House of Representatives.

“B. F. ALEXANDER,
“Speaker of the Senate.

“Approved March 30, 1883. WM. B. BATE, Governor.”

The bills further averred that the defendants had notified the plaintiff corporations that they would proceed under that act to revise all their tariff of rates within the State of Tennessee, and alleged that the proposed action of the commissioners, as well as the said legislation, were in violation of the State and federal constitutions in several respects, not necessary to report, as the decision of the court is not based upon them. The constitutional provisions relied upon, together with the averments of the bills pertinent thereto, are sufficiently stated in the opinions.

The defendants filed their affidavits in each of the cases, in which they denied the contention of the plaintiffs as to the construction of their respective charters, and the allegations upon which the validity of the passage of the act was attacked, denied that the act in any way violated the constitutional provisions relied on by the plaintiffs, or that they were about to act illegally or in violation of plaintiffs' rights, and explained in detail what they had done under the act in respect of the plaintiffs' roads, and what course of conduct they proposed to pursue. They averred the power of the State to pass the act, and elaborately detailed certain facts in the conduct of the plaintiffs respectively, to show the necessity of regulation in order to prevent the unreasonable and unjust charges and discriminations of which affiants alleged the plaintiffs had been guilty, including excessive charges beyond the maximum prescribed by the respective charters of the plaintiffs. They also expressed a great desire to exercise their powers under the act with becoming caution and moderation, and in the best of faith to the railroad com-

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panies and the public, so that the interests of all should be reasonably promoted and protected.

The circuit judge granted a restraining order, and directed the application for a preliminary injunction to be argued at Nashville before himself and the two district judges of Tennessee.

Ed. Baxter, East & Fogg, Dickinson & Fraser, and Smith & Allison for Louisville & N. R. Co.

Wm. M. Baxter for East Tennessee, V. & G. R. Co.

Vertrees & Vertrees and S. F. Wilson for defendants.

BAXTER, J.—The complainant, the Louisville & Nashville R. R. Co., claims to be a corporation and citizen of Kentucky, and the defendants are the “railroad commission,” appointed under and pursuant to the act of March 30, 1883. The provisions of this act, so far as they are material, will be recited in the progress of this opinion. It is enough, for the present, to say that it purports to vest the defendants with general supervision of all the railroads and railroad operations in Tennessee. The complainant, who owns and operates several railroads in the State, contends—First, that said act was not passed in the manner prescribed and according to the formalities required by the constitution, or, if it was, it was not passed in the form in which it has been promulgated; and, secondly, if constitutionally enacted, it is repugnant to the State and federal constitutions, and therefore void and inoperative. It furthermore complains that the defendants are about to enforce the same to its great detriment and irreparable injury, and prays for an injunction to restrain the defendants from interfering, under the color thereof, with its property or business. Per contra, the defendants insist that the act was regularly passed as promulgated, and that it is, in all of its provisions, within the constitutional prerogatives of the general assembly, and a valid enactment; and that the enforcement thereof by them will be no legal wrong of which the complainant has any right to complain.

Our duty, therefore, is to inquire and determine whether there is any irreconcilable repugnance between the act and the State or federal constitutions. Its first declaration is that all railroads in the State are public highways, over which all persons have equal rights of transportation for their persons and freight, on the payment of a just and reasonable compensation therefor. To this we fully assent. Railroads have been created mainly for the accommodation of the public and to facilitate the business of the country. They are indispensable to the rapid and cheap transportation of commercial commodities. Under the fostering care and protection hitherto extended to them, they have expanded into huge proportions. With the beginning of this year we had 125,000 miles of road, representing more than \$5,000,000,000 of capital, giving employment to 500,000 people, and in the annual receipt of more than

\$800,000,000 of earnings. They permeate every part of this extended country, and in a large measure monopolize the entire inland carrying business. Everybody, from the very exigencies of business, is compelled to patronize them. In this regard business men are left without any option. If unrestrained by wholesome legislation the public would be very much at their mercy. They could, by unjust discriminations, made under the name of drawbacks, rebates, or other disingenuous pretences, favor friends and oppress opponents, and so adjust and graduate their rates according to the exigencies of fluctuating markets, as to secure to themselves or those who operate them an undue proportion of advancing prices. It would, therefore, in view of these obvious possibilities, be a humiliating confession to admit that there was no reserved power, either in the court or the legislature, to protect the public against such possible abuses. We do not hesitate to affirm the existence of such a power. Every owner of property, however absolute and unqualified his title, holds it subject to the implied liability that the use thereof shall not be injurious to the public. Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment as shall prevent them from being injurious to the rights of others, and to such reasonable restraints and regulations, to be established by law, as the legislature may from time to time ordain and establish. It is, in this principle, applicable alike to all kinds of property, generally denominated the "police power" of the State, that the authority is found for such control over individuals and corporations, and over their property, as is necessary to insure safety to all and promote the public convenience and welfare. And in the exercise of this reserved authority the legislature may require railroad corporations and persons operating railroads in the State to observe precautionary measures against accident, forbid unjust discrimination and extortionate charges, and, where there is no valid contract to the contrary, prescribe a reasonable maximum of charges for the services to be performed by them, and enforce the same by appropriate pains and penalties. There are many other things that may be lawfully exacted of them, which need not be recapitulated here. The legislature, however, cannot, under the pretence of regulation, deprive a corporation of any of its essential rights and privileges. In other words, the rules prescribed and the power exerted must be within the police power in fact, and not covert amendments to their charters in curtailment of their corporate franchises. Nor can the legislature, in the exercise of this power, make any regulation in contravention of the State or national constitution. Every statute which invades vested rights, inflicts punishment, or takes private property otherwise than by due process of law, impairs the obligation of valid contracts, or denies to any one or more persons the equal protection of the law, are unconstitutional and invalid.

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Does the act in question violate any of these principles? As we have seen, it assumes to vest the defendants with a general supervision of all railroads and railroad operations in the State, and makes it their duty "to consider and carefully revise the tariffs of charges for transportation," etc., and if, in their judgment, the rate charged by them "is more than a just and reasonable compensation" for the service to be performed, or if such rate "amounts to unjust and unreasonable discrimination" against any person, locality, or corporation, they are to notify said corporations, etc., of the changes necessary to reduce the rate to "a just and reasonable compensation," and to "avoid unjust and unreasonable discrimination," and "when such changes are made or deemed unnecessary," said commissioners are commanded to append a certificate of approval to the schedule of charges so authorized by them, and the rates thus fixed, approved, and certified shall be prima facie evidence of the reasonableness and justice of the same; but they are nevertheless subject to revision by juries as will be hereinafter shown. The act does not, in express terms, command railroad carriers to adopt the rates prescribed by the commissioners, but provides that if they shall "exact and receive" more than "a just and reasonable compensation," or "demand more than the rates specified in any bill of lading" issued by them respectively, or shall for their "advantage or for the advantage of any connecting line," or of "any person or locality;" or if such railroad corporation makes any "unjust or unreasonable discrimination," etc., (unless in the fulfilment of an existing contract or some contract to be thereafter made for the purpose of developing some industrial enterprise,) it shall be held prima facie guilty of the crime of extortion, as defined by the act, and subjected to the pains and penalties therein imposed; and every "injured" party is authorized to sue for each extortionate charge, and recover "ten times the amount of the damages sustained," and a reasonable fee for his counsel, unless it shall appear that the alleged extortionate charge conformed to the rates fixed by the commission, in which contingency (if the jury shall entertain the opinion that the rates so fixed are too high or amount to an unjust and unreasonable discrimination), they are required to find for the plaintiff, but only for his actual damages, excluding the fee to counsel. Furthermore, the commissioners themselves are not bound by the rates prescribed by them. On the contrary, they are charged with the duty of "investigating" and "determining" whether any of the provisions of said act are violated, and whenever satisfied that violations thereof have occurred, notwithstanding the corporation may have charged the rates fixed and authorized by them, they are peremptorily commanded by the statute to bring suits for every such violation against the offender in the name and for the benefit of the State; and if upon the trial the jury shall believe from the testimony adduced that the charges are

“unjust and unreasonable,” or that they “amount to unjust and unreasonable discrimination,” their verdict must be for the State, and they are required to assess and return therewith a penalty of not less than \$100 nor more than \$1000, and the court shall render judgment therefor.

The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offences for which said penalties are to be inflicted not being sufficiently defined. The definition of the two principal of these offences, is,—First, the taking of “unjust and unreasonable compensation;” and, secondly, the making of “unjust and unreasonable discriminations.” But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, quasi criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan v. East Tenn., V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, “it would have to be left to a jury, upon the proof, to say whether the difference” in the rates “was discrimination or not,” and that the same difference “might in one instance be held a violation of the law and in another not,” thus making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act. “This,” he said, “I think cannot be done.” If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a standard of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the measure of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice. Hence, the statute under consideration undertakes to supply this desideratum by which juries are to be governed in the determination of the questions submitted to them. That standard is “that no rates or charges for service in the transportation of freight over any railroad, shall be held or considered extortionate or excessive under any proceeding under this act, if it appears from the evidence that the net earnings . . . from its passenger and other traffic would not amount to more than a fair and just return on the value of which such railroads with its appurtenances and equipments to be assessed for taxation.”

This definition is somewhat obscure. But, however interpreted, it does not obviate the objection made or mitigate its force, but intensifies pre-existing doubts. The value is to be the amount at which the road, its appurtenances and equipments are "to be assessed for taxation." But what assessment is to govern? The one made before or after the alleged overcharge or prohibited discrimination? The language of the act is, "to be assessed." But we will not tarry here. Suppose the value satisfactorily ascertained, how and upon what basis are the net earnings to be computed? Is the estimate to be based on past receipts, current income, or anticipated earnings? Is the accused corporation to be held to anticipate its future operations, foresee the amount of its receipts and expenditures, and accurately foreknow its future profits and losses, so as to be able to strike a balance in advance of actual results in order to make its charges conform to the requirements of the statute? If so, how far in the future must their foreknowledge extend? These are some of the many difficulties with which railroad companies are to be embarrassed, and against which the act requires them to provide. But we will suppose these to have been successfully surmounted, and another and more obstinate problem remains. These corporations are, in addition to their expenses, allowed to charge at a rate that will insure a "fair and just return" on the value of their property. But what is a fair and just return? This vital question is by the act left to the unqualified and unrestrained discretion of the jury. There is no legal standard erected whereby the jury can measure the amount. One jury may fix it at two or three per cent per annum, while another jury may, in view of business contingencies and fluctuating values, allow six, eight, or ten per cent, and their action would be so far conclusive as to be beyond the revision of any reviewing court. The facts that the jury are to ascertain are—First, the net earnings; and, secondly, what would be a "fair and just return." The ascertainment of net earnings involves necessarily an inquiry into the gross receipts and expenditures. May the jury revise the expense account, and if so, to what extent? Both the earnings and expenses vary in accordance with the exigencies of business. Are rates to be varied in accordance with the fluctuating fortunes of railroad operations? If so, a charge reasonable in itself and honestly made might be rendered extortionate, and hence criminal, by a reduction of expenses or an unexpected increase of business, or a charge honestly made on the supposition that five or six per cent would be fair and just, might be converted into a crime by the verdict of a jury subsequently rendered, based, it may be, upon facts transpiring subsequent to the alleged violation of the law.

We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—cannot be thus imperilled by such vague, uncertain, and indefinite enactments. The corporations

and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently arraigned, shall, in their judgment and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a five per cent, instead of a four per cent basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendants' property shall be gradually transferred to the public. This cannot be permitted. Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such "fair and just return." The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent, while another might acquit an accused who had demanded and received at the rate of six per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms. No citizen, under the protection of this court, can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation.

The act furthermore conflicts with the eighth section of the eleventh article of the State constitution and the fourteenth amendment to the constitution of the United States. The first of these provides that "the legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to every member of the community who may be able to bring himself within the provisions of such law;" and the last—the fourteenth amendment—prohibits the States from "depriving any person of life, liberty, or property without due process of law, or denying to any person within their jurisdiction the equal protection of the law." It is not necessary for us to undertake, in this case, to define the boun-

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daries or limit the operation of these just constitutional restrictions upon legislative authority. Their general object is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority; to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for the redress of wrongs done, either to his person, reputation, or property. Such, we say, is the general purpose and intent of these constitutional provisions. The accuracy of this interpretation is not, as we understand, questioned by the defendants. Their contention is that railroad property is, in many respects, peculiar in its characteristics and uses, requiring legislation peculiarly adapted to them, and that to so legislate is not within the prohibitions of the foregoing constitutional guarantees, as, for instance, the enactment of a statute to regulate the running of trains by railroads. We admit the contention that it is competent for the legislature to enact laws for the government and regulation of railroads, and that the same could not be rendered invalid because of their non-applicability to other and dissimilar properties. But it does not follow that the legislature can enact statutes applicable as well to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. Certainly, they cannot so distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them. Nevertheless, the act in question, if valid, has made this discrimination in the most direct and positive terms. Although it professes to provide for the regulation of railroad companies and persons operating railroads in this State; and, although both are common carriers by rail, use the same kind of machinery and motive power, are under equal obligations to the public and to their patrons, and compete in business, railroad corporations are thereby burdened with pains and penalties not imposed on persons operating railroads in competition with them. By the first section of the act both are declared amenable to "injured parties" for the causes therein enumerated. But the third section, prescribing penalties in favor of the State, as hereinbefore stated, for charges made in excess of what a jury may subsequently find in manner aforesaid and upon the basis stated, to be more than just and reasonable compensation, or unjust and unreasonable discrimination, is expressly confined to corporations. Under this section, corporations are subject to be sued, harassed, and worried by expensive and ruinous litigation, and to the payment of the penalties and costs therein provided, while persons operating railroads in

active competition with them, engaged in the same kind of quasi public service and under the same obligations of fidelity and diligence, are exempt therefrom.

Another and like invidious discrimination is contained in section 13. This section makes it the duty of the commissioners to "consider and carefully revise all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this State," and if, in their judgment, "any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation," the commissioners are to "notify the person or corporation of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination;" and "when such changes are made," or "when none are deemed proper and expedient, the commissioners are to append a certificate of approval to such tariff of charges, and in case such change" suggested by the commission "shall not be made," or if "any charge, subsequently made, shall not conform thereto," said "corporation shall be held prima facie guilty of extortion." It is corporations, and not persons operating railroads, who are to be held prima facie guilty of extortion under this section, and it is corporations, and corporations only, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt. But the unconstitutional discrimination of this act is not confined to discrimination between railroad corporations and persons operating railroads, but extends to a discrimination between railroad corporations themselves, the twenty-ninth section thereof expressly declaring that "none of its provisions" shall apply to any railroad then being "constructed," or which might thereafter be "begun and constructed in the State," until "ten years from and after its completion." Wherefore this distinction between existing roads and roads to be thereafter built? If the act was a proper regulation, why not apply it to roads to be hereafter built? If the legislature can thus draw the line between different railroads based on the date at which they were or are to be constructed, where and at what point is legislative discrimination to cease? If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another; and if it can do this, the foregoing wise and just provisions of the State and national constitutions, intended to secure an equality of rights to every citizen, may as well be eliminated from those sacred instruments.

20 L. AND N. R. CO. v. R. R. COMMISSION OF TENNESSEE.

Notwithstanding the act under consideration professes to regulate railroad operations, it, in effect, places the business of all railroad corporations in the State under defendants' supervision and control. In addition to the authority to revise their tariffs of charges, as hereinbefore shown, the commissioners may, for undisclosed reasons, and without accountability to any one, give better rates to one corporation than to another. And (section 17) whenever, in their judgment, "it shall appear that repairs are necessary," or that "additional rolling stock" is needed, or "any change of stations or station-houses," or "any change in rates" are desirable, or "change in the mode of operating any road, and conducting its business is reasonable or expedient," the commissioners "shall give information in writing" to the corporation of the "improvements and changes which they may adjudge proper," etc. These powers, in addition to the authority to prescribe rates, include all the incidents pertaining to the absolute ownership of property. In the exercise of them the commission can limit receipts and dictate expenditures, insure prosperity to one company and drive another into bankruptcy, and assume the management and control of the business and operations of every railroad corporation in the State.

But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the State and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which, by force of the prima facie effect therein given to the ex parte action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or quasi criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them, will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its future net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property to be assessed for taxation, the jury being the exclusive judges of what a fair and just return is. This much

is expressly commanded. But "injured parties" are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers ten times the amount of the damages sustained, and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the State can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offence and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the State to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the State to the public use, without that just compensation provided for by the constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands.

Of what avail, then, is the suggestion that the powers of the commission are only advisory? To whom and in relation to what is their advice to be given? They speak to the owners of \$50,000,000 of railroad property; and, although they may speak in the most deferential language, the companies to whom their gentle admonitions are to be addressed, thoroughly understand and justly appreciate the unlimited authority with which they are clothed by the act, the uncertainties ahead, the dangers with which they are environed, and the ruinous litigation to which they will be exposed if they decline to adopt the suggestions made, and they will, therefore, with a lively sense of their utter helplessness, cravenly submit to the will of the commission, although such submission may remotely involve the company in hopeless insolvency. Like apprehension would continue them the ready and flexible tools of the power thus placed over them, and the expressed wishes of the commission would, in every instance, be accepted and acted upon as if it was a positive command. No prescience is requisite to forecast the consequences. The commission would become the practical managers of all our railroads. They are to be elected every two years by a popular vote. In the absence of some radical change of party methods, the commission, to be elected from time to time, would represent and execute the policy of the dominant

party, and, unconsciously or intentionally, manipulate this great interest for the benefit of the political organization to which they belong. Railroad property, on the successful, judicious, and just management of which the future growth and prosperity of the State so essentially depend, would become the prey of the spoils-men; and an irresponsible oligarchy, far more dangerous to political morals and the business interests of Tennessee than any possible railroad combination, would be firmly established in our midst.

We do not, by these comments, intend to cast any imputation upon the defendants. There is nothing in this record which, in any degree, impugns either their actions or motives. So far as we can see, they have, in good faith, endeavored to perform their duties as they understand them. Our object is simply to point out the extraordinary powers attempted to be conferred by the act, and to indicate the large opportunities which it affords for an abuse of power and an invasion of vested rights under the color of authority; how it is that railroad organizations could be subjected to party service under its provisions and be manipulated as well against as in furtherance of the public interests, and to say, in the language of the supreme court of Tennessee, in the case of *Farnsworth v. Vance*, 2 Coldw. 108, that "this tremendous power" does not, as we think, "lurk within the principles of legislative power." We repeat, the regulating power of the legislature and the courts is sufficient to compel railroad companies to perform all their undertakings in favor of the public, and to prevent or punish all derelictions of duty. The legislature can enact laws, within constitutional limits, for the regulation of railroads and railroad operations, but it cannot lawfully authorize a commission, by direct or indirect legislation intended to accomplish that end, or necessarily involving that result, to take control of their business and operations. Such legislation would be an unauthorized and unconstitutional invasion of private rights. The act is also, as we think, a regulation of inter-State commerce, and to that extent an intrusion upon the exclusive legislative authority of Congress. The reasons for this belief will, by special request, be stated by brother Hammond.

Other objections to the constitutional validity of the statute, which we think are entitled to grave consideration, have been urged in argument. But as those already discussed are decisive of the case, we do not deem it necessary to further consider or discuss them in this case.

The prayer of complainants for a preliminary injunction will be granted.

HAMMOND, J.—It is, in our judgment, a grave misapprehension of the Granger Cases to affirm that they support the legislation involved in this controversy. *Munn v. Illinois*, 94 U. S. 113;

Chicago, etc., R. Co. v. Iowa, Id. 155 ; Peik v. Chicago, etc., R. R. Id. 164 ; Chicago, etc., R. R. v. Ackley, Id. 179 ; Winona, etc., R. R. v. Blake, Id. 180 ; Stone v. Wisconsin, Id. 181 ; Shields v. Ohio, 95 U. S. 319. The overshadowing question in those cases, obviously, was that arising out of the claim to entire exemption from all legislative control over their business by the warehousemen and common carriers. This claim they based upon the supposed inviolability of their property rights, and the leading feature of the decisions is that they had not been "deprived of their property without due process of law" by legislation regulating the maximum of charges they might make, because they had, like ferrymen, millers, etc., embarked their property in a business affected with a public interest, whereby it ceased to be *juris privati* only. The court said comparatively little upon the subject of inter-State commerce in its relation to such legislation, and it is somewhat difficult, from the meagre report of the cases, on that point, to understand the language of the court on this topic, but when they are read, in the light of previous and subsequent decisions, on that especial subject, there is no difficulty whatever in reaching a full understanding of its meaning. The decisions amount, we think, only to this—where a warehouseman or common carrier is engaged in the storage of goods or their carriage within a State, and exclusively within it, the rates of charges for such business are subject to legislative control by the State, and the fact that such legislation may indirectly and remotely affect commerce between the States does not invalidate it ; because, if Congress has, by reason of this indirect and remote relation of such local business to inter-State commerce, any right to assert control over what is primarily domestic commerce only, it is to be presumed, until Congress acts, that it does not intend to displace the right of the State to control its domestic commerce.

While it does not appear by the report of these cases, it is familiar to all who are informed about the general character of the discussions had over these questions, that the railroad companies have contended, at all times and in all places, that there is such a necessary co-relation and interdependence between domestic commerce by rail within a State and that which is carried on among the States, and between local and through rates of charges for transportation and competitive rates from more or less distant points, that local rates cannot be regulated by the several States, or any one of them, without disturbing disastrously all rates whatever, thereby seriously and directly affecting inter-State commerce. It was undoubtedly in reply to this argument that the decisions were directed, and there is no denying that they close the argument and preserve the right of State control, notwithstanding any disturbance it may occasion rates for transportation between the States. But there is a vast difference between that principle and the argument made

here in support of this legislation, that until Congress chooses to regulate inter-State commerce in respect to rates for transportation from one to another State, the States may regulate it, each within its own limits. It is applying the doctrine of the supreme court, in these cases, to an entirely different subject-matter. To say that the State may regulate the rates of transportation for its domestic commerce until Congress chooses to exercise any power it may have over that transportation, because of its more or less intimate connection with commerce between the States, is one thing, and to say that all rates of transportation on articles in transit within the borders of the States, whether passing between two or more States or not, concern domestic commerce, and are pro hac vice subject to State control, is quite another.

One of the learned counsel for defendants seemed to shrink from taking this position at the argument, struggling in the face of the plain language of the act to somewhat confine its operation to local limits, but the other, following the attorney-general of Illinois, in *People v. Wabash, etc.*, R. R. 104 Ill. 476; s. c., 105 Ill. 236 (7 Am. and Eng. R. R. Cas. 628; s. c., 12 Am. and Eng. R. R. Cas. 10), boldly assumed that until Congress acts, the Legislature may regulate all rates for carriage "within the State," no matter where the carriage is to be done, on the theory that it is the act of making the charge or rate for transportation that the State condemns or regulates, and not the transportation itself; wherefore its effect on inter-State commerce is only indirect. By this counsel mean—for the illustration was put to test the argument—that the State may regulate charges on a car-load of coal coming from the Ohio river at Cincinnati, or Louisville, to Nashville, or passing through the State to Montgomery, so long as the regulation is confined to the charges for transportation over those miles of the route within the boundary of Tennessee. But we do not think this is what the supreme court means in the *Granger Cases*. It is true, counsel say this is only affecting inter-State commerce "incidentally," but they are driven to this because the supreme court has declared that it can only be so affected. But for that exigency it is probable no ingenuity would suggest that the control of compensation for the carriage of goods was not a direct control of the carriage itself, nor that the control of a part was not as direct in its action as the control of the whole compensation. Nor does it in the least change this result to affirm that it is the act of making an unjust charge or discrimination at which the law is aimed. What is making the charge? Plainly, it is simply the act of contracting for the transportation, and the operation of the law is just as direct when the contract is forbidden, or regulated as to its terms, as when the act of transportation itself is forbidden or only permitted on those terms. It is, in fact, the most direct and, of all regulations, the most vital to that intercourse

we call commerce, to control the compensation for that transportation by which an exchange of the commodities is effected; for without the transportation there can be no exchange between different places, and it is therefore the chief element of inter-State commerce. It is like saying the control of the circulation of the blood for a space of one inch along the aortal trunk affects the victim's life only "incidentally," to say that the control of the rates of compensation of that part of a great line of inter-State commerce, lying between the boundaries of a State, so affects that commerce. The injury may be small, but it is none the less direct, and not at all incidental, because it is only slight. And, as the circuit judge well remarked at the argument, if Tennessee may control the rates for inter-State commerce within its limits, Kentucky may, and so on until the States have usurped the regulation of the whole matter. Indeed, this act of the legislature seems to be grounded on this very notion, for we find in section 26 that the railroad commission is constituted a kind of diplomatic agency to accomplish that purpose. It enacts:

"That it shall be the duty of the railroad commission, by correspondence, conventions, or otherwise, to confer with the railroad commissioners of other States of the Union, and with such persons from States having no railroad commissioners as the Governor of such States may appoint, for the purpose of agreeing, if practicable, upon a draft of statutes to be submitted to the legislature of each State, which shall secure such uniform control of railroad transportation in the several States, and from one State into or through another State, as will best subserve the interest of trade and commerce of the whole country; and said commission shall include, in their annual report to the Governor, an abstract of the proceedings of any such conference or convention."

It was to obviate the necessity for making commercial treaties—and in effect this section is a provision for such treaties—and to avoid the danger, confusion, and disaster certain to result to commerce between the States from this power of sovereign States over that commerce that the exclusive power was conferred upon the federal government "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." Const. art. 1, § 8. This operates as a necessary, wise, and self-imposed limitation upon the otherwise sovereign power of the States over the subject. It is not a police power in any proper sense, and in our judgment much confusion has arisen by so treating it in the struggle to find some method of evading the federal compact to surrender it. It belongs, it may be, to that immense and almost illimitable residuum of governmental power which has not been technically classified; but if it has been, there is no better name for it than that by which it is known among all nations—the commercial power; or, as it is called in the constitution itself, the

power to regulate commerce. It is one of the chief functions of all governments to promote and encourage the interchange of commodities and intercourse of the people among themselves and with foreign nations and neighboring States. In the exercise of this power innumerable laws are made, and, in matters relating to the international or inter-State concerns of commerce, treaties and compacts are formed, of which the federal constitution is, in this respect, a conspicuous example.

If the interchange or intercourse be "within the State," it is properly called domestic commerce, if from one to another, international, or, as to our Union, inter-State commerce; and the Government may, and often does, where it can control at all, under this power "to regulate commerce," control the instrumentalities of that commerce. There are, to be sure, certain limitations on the power, as on all its other powers, arising out of the laws of private right and private property; but it is too late now to deny, in view of these decisions of the supreme court, that charges for transportation are a matter of public concern, the private property engaged being dedicated, so to speak, to a public use, and the Government may therefore exercise certain legislative control of these charges. But non constat that the States may, under our system of government, exercise it. If it be domestic transportation, wholly within the State, they may; nor does it cease to be wholly within because the thing transported has come from without, nor because it may be destined to go, ultimately, beyond the State; but the particular transportation for which the charge is made must be wholly within the State. If it be partly within and partly without, the State cannot regulate that within and leave the federal power to act on that without, but has no control whatever over the charges for such a transportation. It is in the very nature of the thing itself not local or of domestic concern, and the States have no more power by such a construction or characterization to regulate the rates by the uniform legislation suggested by the section of the act just quoted than they have to so regulate the rates of postage or the weights of coins. That Congress refrains from establishing such uniform regulation only indicates an expression of the federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the States. Declamation and argument in favor of the wisdom or necessity for some regulation are appropriate in the halls of Congress, at the ballot-box, or wherever the State, as one of the federal units, may bring its power to bear upon the federal will, but they cannot and should not influence the courts, State or federal, to evade or deny this distributive principle of our governmental power over the subject of transportation as an instrumentality of commerce.

Again, to interpret the opinions of the supreme court in the

Granger Cases, as they are by this act of the Tennessee legislature and the arguments made at the bar interpreted, is to convict the court of an expression of the barest platitude by a declaration, in another form, that an act of a State legislature can have no extra-territorial force; for it amounts to nothing more than to hold that when a car-load of merchandise starts across the country from New York to New Orleans, each State may, until Congress acts, regulate the charges for its transportation over the rails situated in that State; because it is apparent that, whether Congress has acted or not, neither State could regulate it elsewhere, and this without the least regard to the "domestic" or "inter-State" character of the commerce, or to the "direct" or "incidental" effect upon it. Every mile of the route lies in some State, and when each has acted successively on the transportation, whether the action be "direct" or "incidental," and the subject-matter of it "domestic" or "inter-State," becomes wholly immaterial, and there is nothing left to support the force of these terms as used in the opinions. But they are full of significance, if we observe the distinction between a transportation that commences in one State and ends in another and one that commences and ends within the limits of a single State. By this act, and the argument in support of it, all distinctions are obliterated and all commerce is forced to become domestic in order that the States may act upon it. While the car-load of goods is in New York it is domestic to that State, and so on as it rolls over each State line to the end. The inexorable logic of the argument, therefore, is that, until Congress acts, there is no such thing as inter-State commerce in the matter of the transportation of commodities passing in exchange between the States.

This construction ignores the most prominent predication in the opinions of the court on the subject of inter-State commerce. In every case of the series affecting railroad transportation, the court affirms with great distinctness the analogy to the Warehouse Case, the first of the series. Now, the subject-matter of that case was storage, which was held to be wholly within the State, and therefore subject to its regulation as to rates, and this regulation was not to be evaded because some of the grain might have come from another State, and might be destined for sale beyond it. We can scarcely imagine inter-State storage, and the analogy of transportation to it would be incomplete unless the transportation involved were wholly between points within the State, as it plainly was in the Shields Case of the series. But let us imagine an elevator on wheels, and engaged in the storage of grain while passing from one State to another. It may be affirmed on these cases, keeping the analogy in view, that grain received and stored while passing from one point in Illinois to another in the same State was a transaction within that State, and subject to its control. But surely there is nothing in them to justify the claim that for the

storage of grain received at Chicago, to be delivered in Detroit, the State of Illinois could regulate for the time consumed in passing through that State, and Michigan for the time in that State. So, as to railroad transportation, keeping again the analogy in view, we do not understand these cases to justify the claim that a State may be measured from east to west and from north to south, as appears in argument has been done by the defendants here, and on the basis of distance within the State regulate the charges for all property and persons passing over the rails within the territorial jurisdiction, but only that the State may regulate local rates on shipments commencing within the State and ending within it, although the article carried may have come from without and be destined to go beyond the State, and although in this remote and indirect way inter-State commerce may be involved. For example, a car-load of merchandise shipped at Nashville to Memphis, on a route wholly within the State, may have come from Louisville and may be intended to be sent from Memphis into Arkansas, without affecting the State's power of regulation, but it does not follow if it came from Richmond via Nashville or Memphis en route to Arkansas, or to Nashville or Memphis, that the State would have the same power of regulating rates on the distance travelled within the State; and this is the important distinction which this act overlooks.

The court does not say in these Granger Cases, and has not elsewhere definitely determined, that congress can ever control or regulate local rates for domestic transportation, as we have above described it, by reason of any remote or indirect influence such regulation may have on inter-State commerce, but it does say that until congress assumes that power the States may continue their control. This view of these cases carries out the analogy to storage in a warehouse, and no other is consistent with it. Any argument which disregards this pre-eminently distinctive and descriptive analogy that is the very foundation stone of the opinions in the railroad cases of the series, does the cases injustice and puts them in irreconcilable conflict with every decision the court has made on the subject of inter-State commerce, while the construction we give them preserves their harmony with the others. It is proper to remark here that, for the purposes of this judgment, we deem it unimportant to determine whether any particular transportation is to derive its character of locality or domesticity from the status of the road over which it passes as lying and having its legal existence only within the State,—in which case all transportation over it might fall within the definition of domestic commerce,—or from the nature of the contract for a carriage which, by its terms, begins and ends at points within the State, without any regard to the status of the road. This act makes no distinctions in either aspect of this question, and is equally defective whichever view we

take of it, and this whether either or both be correct. Moreover, neither of the plaintiff's roads in the cases we are deciding is local or domestic in the sense above described.

This opinion would be unpardonably incomplete if we did not, in view of the magnitude of the interests here involved, justify our judgment by a careful examination of the adjudications above construed. In the Iowa case it does not appear what particular acts of transportation, if any, were involved. It was an injunction bill by the railroad company to enjoin the prosecution of suits against it; whether those only threatened or already brought does not appear. The opinion is mainly devoted to other questions; but, although there were two railroads connected by a bridge and making, in one sense, a continuous line between two States, and, in that sense, engaged in inter-State as well as State commerce, we have the authority of the opinion itself that the plaintiff's roads, "like the warehouse, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern." This being so, all transportation upon it was, in a legal sense, exclusively within the State, and it mattered not that the goods or passengers had come from another State or where they were destined—the transportation was wholly domestic, and the analogy to the storage of grain is complete. It was a local road leased by a foreign corporation, and in contemplation of the opinion, all transportation over it was essentially domestic, and its inter-State commerce was such only in the indirect way in which the grain elevator was engaged in like commerce.

We have the authority of the supreme court of Iowa for this construction, in a decision made long afterwards, declaring the Iowa act unconstitutional, as an attempt to regulate inter-State commerce. Says that court:

"The cases of *State v. Munn*, 94 U. S. 113, etc. (citing them), do not appear to us to sanction the validity of acts of the State legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the States to fix reasonable warehouse charges, and reasonable charges for transportation of freight within the boundaries of the States, respectively, and that, when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the State are not regulations of inter-State commerce because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of *Hall v. De Cuir*, 95 U. S. 485, and *Railroad Co. v. Husen*, Id. 465." *Carton v. Illinois Cent. R. Co.*, 59 Iowa, 148, 153; a. c., 22 Amer. Law Reg. 373, and note.

That was a case of the continuous shipment of car-loads of wheat from Ackley, Iowa, to Chicago, Illinois, and a claim for conform-

ity to the rates established by the State act for so much of the distance as lay in Iowa, and the act was held a violation of the commerce clause of the federal constitution.

In the Wisconsin case, the next in the series of the Granger Cases, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge Drummond tells us the question we are considering was scarcely argued at all in the court below, and evidently it was only incidentally considered in the supreme court. *Piek v. Railroad Co.*, 6 Biss. 177. The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for "carrying freight which comes from beyond the boundaries of the State and to be carried across or through the State." Possibly, notwithstanding its terms, the act may have been construed, within the purview of this exception, not to apply to persons and property coming from other States into Wisconsin, or going from that into other States, which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the State Freight Tax Cases, 15 Wall. 232, was reserved, and not decided in that court. The opinion of the supreme court says:

"The law is confined to State commerce or such inter-State commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to inter-State commerce it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

Now, strange to say, the bill in that case attacked the law because the exemption we have noticed was itself a regulation of inter-State commerce, on the theory, perhaps, that it gave an advantage to the citizens of the State over those of other States, which is sometimes applied as a test to determine whether a given law be a regulation of inter-State commerce. But whether the court had the exemption section of the Wisconsin act in view, and construed the act in reference to it, is not satisfactorily shown. If, however, we turn to the report of the case to see what is meant by "this company" having "domestic relations" with the people of Wisconsin, the analogy of the warehouse case reappears, though not as distinctly as in the other cases. No particular freight charges were involved in the controversy, it being a bill by bondholders and stockholders to enjoin the company from obedience to, and the railroad commissioners from enforcing, the act, and although this Wisconsin company had been consolidated with an

Illinois corporation, the court is at the greatest pains to show that it had not ceased by that consolidation to be, in a legal sense, a local road, as the Iowa road had just been held to be. Counsel say in argument here that this was for another purpose in the opinion, which is true, but it is as potential for one purpose as another, and the opinion in the language quoted so treats it by connecting the "domestic relations" of "this company" with the people of Wisconsin to this subject of inter-State commerce. There is certainly nothing in the case to show specifically that the court held, as we are asked to hold, that a State may regulate fares and freights, for carriage between two or more States, over that portion of the route lying in that State. This construction is purely an inference drawn by those who claim it. We freely admit that, looking alone to this series of cases, and ignoring all others on the subject of inter-State commerce, the construction we are giving them is somewhat inferential, but it seems to us the fairest and most reasonable. And this more clearly appears by reference to the report of this case in the court below, and to that of a contemporaneous case under the same statute in the State courts of Wisconsin, in which the pleadings and argument are more fully shown. *Atty. Gen. v. Railroad Co.*, 35 Wis. 425, 449, 453, 470, 478, 484, 485, 511. The court below complained that the case, now under analysis, was scarcely argued on this point, and for that reason refused to consider it, while in the court above it was thought of so little relative importance that the dissenting opinions do not notice it, and the court disposes of it in a comparatively few lines. And yet, the misconception of these Granger Cases, which we are seeking to remove, is undoubtedly the foundation of a belief in the power of the States to legislate, as this act does, without limitation or qualification.

In the next case of the series, the particular character of the transportation involved is not shown, and it is of no importance on this subject; nor do the next two shed any further light on it, except by the constant reference to the Warehouse Case. But when we come to the Ohio case, generally classed as one of the series, we find for the first time that the particular act of transportation is given, and that it commenced and ended within the State. Going back to the Warehouse Case, we find that the language of the court on this subject of inter-State commerce seems to have been selected with a purpose to use the case for convenience as an analogy in the subsequent cases affecting railroads. The court says: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois." They are likened to the carts and drays transferring grain from one railroad station to another, and their instrumentality in inter-State commerce is said to be incidental. Certainly, this cannot be said of either of the roads in the cases we have in hand.

One plaintiff is a Kentucky corporation, extending its road into this State by license of our own laws, presumably, for the primary purpose of inter-State commerce. *Louisville & N. R. Co. v. Henry Co.* (unreported), by Baxter, J.; *Callahan v. Louisville & N. R. Co.*, 6 Am. & Eng. R. R. Cas. 594, by Key, J. The other road, as shown by the bill, extends into Georgia, Alabama, and Mississippi, and in no sense can they be said to be carrying on their business exclusively within the limits of a single State. They are not like warehouses, carts, and drays, or purely local roads engaged incidentally in inter-State commerce, but are great arteries of intercourse and transportation with neighboring States—as much so as the Tennessee, Cumberland, or Mississippi rivers. The analogy wholly fails unless we limit the regulation, which this act does not pretend to do, to purely local transportation commencing and ceasing at points within the State; and, even then, it may be doubtful, on these Granger Cases, whether the analogy they establish would apply, unless the roads were local in the sense the roads in those cases were held to be, which point we need not determine, as the act itself makes no distinction.

Turning now from the Granger Cases to others, and this interpretation of them becomes so plainly the correct one that it seems impossible to resist the conviction that they have been misunderstood in the reliance placed upon them to support this act. It was held in the *State Freight Tax Case*, 15 Wall. 232, that the transportation, whether by land or water, of commodities from one State to another was inter-State commerce, and the prominent idea of such commerce in the minds of the framers of our federal constitution; that its direct regulation is exclusively within the control of Congress; that when the subjects of regulation are in their nature national, or admit of uniform regulation, that fact demonstrates the exclusive power of Congress over them; and that the State cannot, even in the exercise of its taxing power, jeopardize the freedom of transportation between the States. That the regulation of rates of charges for such transportation does admit of uniformity, cannot be denied, and certainly not by the advocates of the power to pass this act, since it provides for such uniform regulation by inviting and promoting separate action by all the States in the manner therein pointed out. And, if the State may not, by the exercise of its taxing power, interfere with the freedom of inter-State commerce, under what power can it act more potentially? Again, if a tax upon a commodity in transit between the States be a direct interference with the freedom of the transportation, can it possibly be said that an act which forbids the carriage by punishing the carrier unless he complies with certain prescribed conditions is any less direct in its action? We think not. The Granger Cases and that just cited may be harmoniously reconciled, understood as we have interpreted them, but

not as the defendants' counsel and the framers of this act have construed them.

The Daniel Ball Case, 10 Wall. 557, and the Montello Case, 11 Wall. 411; s.c., 20 Wall. 439, are very clear illustrations of the force and effect of the situs of an instrumentality of commerce in determining whether the subject-matter of the given regulation be one of domestic concern only incidentally connected with inter-State commerce, or a direct instrumentality of that commerce itself, and in the first case is a complete and careful definition of "commerce between the States" and the power of Congress over it. We had intended to quote extensively from the opinion, because, more than any other perhaps, it explains the language used in the Granger Cases, but since it would prolong this opinion we forbear, and simply invite a careful scrutiny of the case. The distinctions are there pointed out between the domestic commerce, which the States may regulate as well as its agencies, and that inter-State commerce which, as to itself, they cannot regulate at all, directly or indirectly, incidentally or otherwise, whether Congress has acted or not; but as to the agencies of which, until Congress acts, there is left to the States almost illimitable control in any department of governmental power, so long as such control affects the commerce itself only incidentally, and does not directly interfere with its freedom. This is the thing secured by the constitutional provision, which is really a treaty or compact for absolute free trade between the States, subject to such uniform regulations as Congress alone may impose. And it is doubtful if Congress itself could impose one rate for Tennessee and different rates for the other States, as separate action by the States must do.

In another case the Supreme Court says:

"The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled." *Welton v. Missouri*, 91 U. S. 275, 282.

It is to be noticed in the Daniel Ball and Montello Cases, *supra*, that there was no question involving the commerce itself, but only an instrumentality of it, namely, a steamboat; the inquiry being whether it was subject to the navigation laws of the United States, and its solution depending on whether Grand Rapid and Fox rivers were domestic in the sense that they lay exclusively—like the railroads, in the Granger Cases—within the limits of a single State. It was found—and it is worthy of remark that one of them was artificially made so, like railroads—that these rivers were, as a geographical fact, not domestic, but inter-State rivers (if they may be so called), and that the steamboats were within the power of Congress. But had the fact been the other way, as in

the Granger Cases, the result would have been the same, so far as the power of Congress was concerned, because it was shown that the boats were actually carrying goods between the States, and this fact would support the power of Congress, which had acted as to steamboats so engaged. This was plainly intimated, if not decided. The power of Congress to regulate such an instrumentality of commerce is practically unlimited, because it may reach the commerce itself as well as its agencies; wherefore, there is no need to look to the character of the regulation in determining the power, but only to the character of the commerce. But when we turn to the power of the States, we must necessarily scrutinize both. The definition of inter-State commerce, as given in these cases, does not change; it is fixed whether Congress has acted or has not acted, and the real question, as to the States, always is twofold,—does the proposed law act upon the commerce itself, or does it act only on the instrumentality? If the first, it is always void; if the second, its validity depends on the circumstances. Here lies the fallacy of this and all legislation, which overlooks the not always broad distinction between regulating the commerce itself and its instrumentalities, and we have the authority of the supreme court in the next case cited for saying it is often disregarded. We quote again:

“Commerce with foreign countries and among the States, strictly considered, consists of intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the great power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.” *Mobile Co. v. Kimball*, 102 U. S. 691, 702.

Can anything be more explicit than this, and does it not apply to this legislative act? The court has repeatedly said, as here, that the transportation of the commodity exchanged is a part of the commerce itself; and if the transit be between two or more States, it is, *ex vi termini*, inter-State transportation and inter-State commerce. Being so, does not any law which controls the price of the transportation, or restricts it under pains and penalties, affect the commerce itself, and this as directly as possible? It is a delusion to call such a law a regulation of the instrumentality, and the delusion is not concealed by naming the process a regulation of railroads or corporations or monopolies, nor yet by decrying these as instrumentalities which need regulation, as no

doubt they often do in this regard. It is the instrumentality by which we reach that intangible thing called commerce, and in that sense the instrumentality, and not the commerce, is always regulated ; but this confuses the distinction above adverted to by the supreme court.

To illustrate again, take a person engaged in inter-State commerce as a carrier on ocean, river, railroad, or highway. If he or his agents be found within the limits of any State violating its laws, he may be arrested and imprisoned ; if his property fall under condemnation of the law, it may be seized, although engaged in the commerce ; he, his agents and property, and even his receipts for the freight, may be taxed, as well as any special franchise or privilege enjoyed by him, if these taxes be not disguised regulations of commerce. *State Tax Gross Receipts Case*, 15 Wall. 284 ; *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532. By these and numerous other laws the commerce may be incidentally affected, even to destruction in some cases, through operation upon the instrumentality or agency alone ; and where the carrier is a corporation, there are extended fields for such operation.

But if the carrier in the illustration is engaged in domestic commerce, where the State can act directly upon it, the capacity for affecting the articles of inter-State commerce which may fall into his hands to be locally transported is increased ; but the effect on inter-State commerce is still incidental, and although the particular regulation ceases to act on the instrumentality alone, but acts directly on the State commerce itself, yet the distinction between a direct action upon the inter-State commerce, and an incidental effect upon it through action upon the instrumentality, remains obvious ; for, in such a case, the domestic transportation is itself only an instrumentality, agency, or auxiliary of the inter-State commerce, which, until Congress act, remains subject to State control. This distinction must be observed in determining what is incidental only in its action on inter-State commerce and what is direct ; and it runs through all the cases. But when a plain and unmistakable case of direct action on the commerce itself is presented,—as all regulations or restrictions on the contract of transportation must be,—all that need be looked to is the character of the commerce so regulated, and if it be inter-State transportation, as defined in the cases cited, regulation or restriction by the State is void. If, for example, as in *Hall v. DeCuir*, 95 U. S. 485, the State, exercising its power to secure equal civil rights in the matter of transportation, undertakes to prescribe the privileges a passenger shall enjoy, it is void, although Congress has not acted upon that matter, and the passenger be going only between points in the same State. If, again, the State undertake, beyond the scope of vital necessity, to exclude or regulate the entrance of diseased cattle

into the State, it is void. *Railroad Co. v. Husen*, 95 U. S. 465. And if, under the disguise of an inspection law—the power of inspection being especially reserved to the States in the federal constitution—the State attempt to exclude or regulate the introduction of passengers thought to be paupers, criminals, etc., it is void. *People v. Co. Gen. Transatlantique*, 107 U. S. 59; s.c., 2 Sup. Ct. Rep. 87. And these examples might be multiplied.

It does not advance the argument to invoke the police power of the State to support this act of the legislature; for, with noticeable emphasis, it is held in the last two cases cited, as everywhere, that neither in the exercise of its police nor any other power, can the State make a law which is in effect a regulation of inter-State commerce. Nor does an appeal to the power of the State over the corporations of its own creation strengthen the argument; for it cannot, by the charters themselves, make regulations of inter-State commerce. Such regulation is as void there as elsewhere. *Telegraph Cases*, 96 U. S. 1. If control over the rates be desired by the State under all circumstances, it might possibly secure it by prohibiting its corporations from engaging in inter-State commerce in any other way than as domestic roads, and confining them absolutely to the business of transportation within the State, if this would not of itself be an invalid prohibition as a discrimination against inter-State commerce. Possibly, when incorporators ask a grant of franchises to enable the company to engage in inter-State commerce, and, in consideration of the grant, agree not to charge more than a certain maximum, or to establish a certain schedule of rates for the transportation of commodities carried in such commerce, they would be bound by it; but not, be it remembered, because there has been a lawful exercise by the State of a municipal power to prescribe such rates,—for that would be none the less a regulation of inter-State commerce, and as such void,—but because the incorporators, as owners, with power, in the absence of paramount regulation by law, to prescribe their own rates, have established these. *Consensus facit jus*.

It is obvious, however, in such a case, that the contract cannot be subsequently changed qua contract without the consent of both parties, and the remedies for its violation would be those available for a breach of the contract; and where, in the absence of congressional legislation, the consent of the carrier is wanting to any change in the charter, it is inoperative to bind him, not so much because the legislature cannot impair the obligation of a contract as because, without his consent as owner, there can be no regulation at all by State legislation. It being in such case a matter of contract simply, and not of municipal law to regulate the rates, there can grow out of it no enlarged power over inter-State commerce, whatever else may grow therefrom. The act qua a regulation of inter-State commerce is as invalid in the charter of a transportation

company as elsewhere in any statute, and necessarily as invalid in any subsequent statute, no matter how full the reservation of power over the charter may have been made. We need not say that, as to the power to regulate the domestic or local commerce of the company chartered, other principles may come into play. There is no doubt that the fact that our railroads, until recent years, and before the day of consolidations, combinations, trunk lines, and continuous rails were regarded as purely local institutions, beginning and ending within the boundaries of a single State, and the further fact that they were all owned by corporations whose migratory capacity was limited and almost denied, have done much to intensify the notion of their still being mere local agencies of commerce. But by active State legislation had for the purpose they have now, for the most part, become continuous avenues of commerce among the States, sweeping over State lines as easily as the Mississippi River rolls along them, and stretching quite as far. We do not see why this fact should not have the same influence it had in *Hall v. De Cuir*, supra, and the other cases, and which was suggested by Mr. Justice Miller in *Gray v. Clinton Bridge*, 7 Amer. Law Reg. (N. S.) 149.

The supreme court of Iowa denied validity to the law of that State on the same ground we take, as did also the circuit court of the United States for that State. *Carton v. Illinois Cent. R. Co.*, 6 Am. & Eng. R. R. Cas. 305; *Kaeiser v. Illinois Cent. R. Co.*, infra. The case of *Georgia R. R. v. Com'rs* (not yet reported), did not touch this question, nor does the case in the circuit court of the United States for that State mention it. *Tilley v. Railroad Com'rs*, 4 Woods, 427; s. c., 5 Fed. Rep. 641.

The scope and extent of the principle we are enforcing with the distinctions we have endeavored to point out between the characteristics of federal power over commerce between the States, and the domestic power of the State over the instrumentalities thereof found within its borders, find an illustration in the power of the federal congress, on the one hand, over canals owned and constructed by the State itself, and wholly within it, and on the other, of the State legislature over ships and watercraft in the establishment of liens for domestic supplies furnished in the home port. *In re Boyer*, 3 Sup. Ct. Rep. 434; *The B. & C.*, 18 Fed. Rep. 543; *Escanaba Co. v. Chicago*, 107 U. S. 678; s. c., 2 Sup. Ct. Rep. 185; *The Lottawanna*, 21 Wall. 558; *The Illinois*, 2 Flippin, 383.

It is not necessary to go into any more elaborate examination of the cases in the supreme court on this particular subject of interstate commerce, for we are relieved of that necessity by an eminent writer, who has, by his thorough and superior authorship, distinguished himself above the mere book-makers of this day. He has carefully examined and classified the cases in a useful manner, and

evidently laments that he cannot find in the rulings of the court any larger jurisdiction for the States over this subject of inter-State commerce than he thinks they establish. The cases since Mr. Pomeroy wrote will be cited at the end of this opinion for convenience of consultation. 4 South. Law Rev. (N. S.) 257. See, also, 7 South. Law Rev. 377; 3 South. Law Rev. (O. S.) 656; 13 Amer. Law Reg. (N. S.) 1, 185; 23 Amer. Law Reg. 81; 12 West, Jur. 17; 12 Cent. Law J. 194; Pierce, R. R. 468.

The whole list, from *Gibbons v. Ogden*, 9 Wheat. 1, and *Brown v. Maryland*, 12 Wheat. 419, to the latest, point with reasonable certainty to the line between valid and invalid legislation by the States. The Granger Cases must take their places in this line and conform to it, for there is not the least indication of any purpose to overrule the other cases, and an abundant manifestation in subsequent cases of adherence to them. They show that the States may tax, inspect, police, and in other abundant ways, by the exercise of any kind of power they possess, regulate the agencies and instrumentalities of inter-State commerce; they may dig canals, build railroads, improve rivers and harbors, establish ferries, build wharves, construct dams and bridges, and control pilotage; or they may authorize persons and corporations to do these things, and regulate them after they are constructed or established; but neither in their taxation, their inspection, their policing, or other exercise of power, can they by their regulations act directly on the commerce, as these cases define it, between the States. As to that, until congress acts, the commerce must be free.

We do not overlook the argument that this act leaves the carriers free to charge what they please, so long as it is not unreasonable and unjust. Nevertheless it prescribes regulations for determining what is unreasonable and unjust, based on an assumed power over the subject which we have endeavored to show does not exist. The character of the regulation is immaterial where you cannot regulate at all. Carriers cannot charge more than is reasonable and just, but if there be needed any legislation to more effectively determine what is unreasonable and unjust, and to prevent discrimination, it must come from congress in cases like this. We hold, without the least hesitation, after this examination of the subject, that an act of the legislature which attempts, as this does, to regulate, no matter how, all transportation over the railroads in this State, and to revise all tariffs of charges for transportation over those roads, is, so far as it relates to the plaintiffs in these cases before us, an attempt to control the compensation to be charged by them for the transportation of commodities and persons in transit between two or more States, for that portion of the route lying within this State, and therefore invalid as a regulation of inter-State commerce, acting, as it does, in the most direct way possible on that commerce itself. This act makes no discriminations whatever

in this regard, and we cannot, by judicial action, insert them in the act by limiting our injunction in respect of the interference of defendants with the charges by plaintiffs for fares and freights in any way. This would be to legislate by judicial decree, for there is nothing in the act to guide us in fixing our limitations. It does not appear that the legislature would have passed this law, or any law, confining its power as we have suggested it is confined by the federal constitution, or the interpretation we here give that instrument. If the legislature cannot legislate as it has proposed to do, we do not know that it wishes to legislate at all. *Cooley, Const. Lim.* (4th ed.) 214-219; *Packet Co. v. Keokuk*, 95 U. S. 80; *Neely v. State*, 4 Baxt. 174. Hence, we must take the statute as we find it, and restrain the defendants from any action under it as to these plaintiffs.

There are other grounds of fatal objection to this legislation which have been stated by the learned circuit judge in which we all concur; and other questions have been ably argued by counsel, but we do not deem it essential to express any opinion on them because their determination, either way, would not affect our decision on this motion.

Consult *Turner v. Maryland*, 107 U. S. 38; s. c., 2 Sup. Ct. Rep. 44; *People v. Co. Gen. Transatlantique*, 107 U. S. 59; s. c., 2 Sup. Ct. Rep. 87; *Wiggins v. East St. Louis*, 107 U. S. 365; s. c., 2 Sup. Ct. Rep. 257; *Transp. Co. v. Parkersburg*, 107 U. S. 691; s. c., 2 Sup. Ct. Rep. 732; *Telegraph Co. v. Texas*, 105 U. S. 460; *Bridge Co. v. U. S.*, Id. 470; *Packet Co. v. Catlettsburg*, Id. 559; *Webber v. Virginia*, 103 U. S. 344; *Tiernan v. Rinker*, 102 U. S. 123; *Lord v. Steamship Co.*, Id. 541; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. St. Louis*, Id. 423; *Guy v. Baltimore*, Id. 434; *Machine Co. v. Gage*, Id. 676; *Trade-mark Cases*, Id. 82; *Transp. Co. v. Wheeling*, 99 U. S. 273; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Cook v. Pennsylvania*, Id. 566; *The Telegraph Case*, 96 U. S. 1.

KEY, J.—I have not thought it necessary to prepare any opinion in these cases, and am content to announce that I concur in the opinions just read.

Statutes Prohibiting Unjust Freight Charges and Discriminations.—The legislatures of the various States have the right to pass appropriate laws prohibiting excessive freight charges and unjust discriminations. Such laws are constitutional and valid. *Olcott v. Supervisors*, 16 Wall. 694; *Railroad Co. v. Richmond*, 19 Wall. 584; *Commissioners v. P. & O. R. R. Co.*, 63 Me. 279; *Shipper v. Commonwealth*, 47 Pa. St. 340; *Blake v. Winona & St. Peter R. Co.*, 19 Minn. 418; *Beekman v. Saratoga & Schenectady R. Co.*, 8 Paige, Ch. 45; *State v. Winona & St. Peter R. Co.*, 19 Minn. 484; *Fuller v. Chicago & N. W. R. Co.*, 81 Iowa, 188; *Hudson Co. v. State*, 4 Zab. (N. J.) 718; *McGregor v. Erie R. Co.*, 6 Vroom (N. J.), 89; *Tilley v. Savannah, etc., R. Co.*, 1 Am. & Eng. R. R. Cas. 615; *People v. Wabash, etc., R. Co.*, 7 Am. & Eng.

R. R. Cas. 628; s. c. 12 Am. & Eng. R. R. Cas. 1; Smith v. C. & N. W. R. Co., 1 Am. & Eng. R. R. Cas. 403; Graham v. C., M. & St. P. R. Co., 3 Am. & Eng. R. R. Cas. 289; Georgia Railroad & Banking Co. v. Smith, 9 Am. & Eng. R. R. Cas. 385.

As to the other questions involved in the principal case see *Kaeiser v. Illinois Central R. Co.*, and note, *infra*.

KAEISER

v.

ILLINOIS CENTRAL R. R. CO.

(*Advances Case, U. S. Circuit Court, S. D. Iowa, C. D. October 24, 1883.*)

Article 1, § 8, of the constitution of the United States confers upon congress the power "to regulate commerce with foreign nations and among the several States." This power of congress is exclusive. It follows that the act of the general assembly of Iowa, approved March 23, 1874, providing for a tariff of maximum charges for the transportation of freight and passengers by railroads, in so far as it relates to through shipments over inter-State lines, is unconstitutional.

The court, in its opinion, laid down the following propositions as settled: (1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one State to a place in another is "commerce among the States." (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one State to places in other States is a regulation of commerce among the States. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation.

By an act of the general assembly of Iowa, approved March 23, 1874, a tariff of maximum charges was provided for the transportation of freight and passengers by railroad. The act, by its terms, applies to "all railroad corporations organized or doing business in this State, their trustees, receivers, or lessees." It provides that "all railroads in this State shall be classified according to the gross amount of their respective annual earnings within the State per mile for the preceding year," and for a separate tariff of rates for each class. It also provides that the tariff of rates so established shall "be considered a basis on which to compute the compensation for transporting freight, goods, merchandise, or property over any line of railroad within this State. This suit is brought to recover damages for overcharges upon freight shipped from points in Iowa to points in Illinois and Wisconsin over a part of defendant's road in Iowa, and over connecting lines in the other States named. The answer sets up, among other things, that the statute

above named neither had, nor was intended to have, any extraterritorial operation beyond the limits of Iowa, and neither had, nor was intended to have, any application to or effect upon contracts, either expressed or implied, for the conveyance of persons or property from a point in one State to a point in another State. Plaintiff demurs to this answer, and the principal questions discussed by counsel are: (1) Did the act, by its terms, apply to inter-State commerce? (2) If so, is it constitutional?

A. B. & J. C. Cummings for plaintiff.

John F. Duncombe for defendant.

McCRARY, J.—There may be room for doubt as to whether the act of 1874, by its terms, applies to inter-State commerce. If it be construed as in *pari materia* with the subsequent act of the sixteenth general assembly, (1876,) “for the relief of certain railroad companies, agents, and employees,” there is, I think, sufficient ground for holding that it was only intended to regulate such transportation as was carried on within the State. The latter act provides for releasing railroad companies from liability for having violated the act of 1874 upon certain conditions. Among these conditions was a requirement that such railroad companies should enter into bonds, with security, conditioned that they would not seek to evade the provisions of the act of 1874 “by increasing or contriving any increase on through rates to points on its line outside of the State.” If the original act itself was intended to apply to through shipments between points in this State and points in other States, it is difficult to see how it could have been evaded by increasing such rates.

It is plain, therefore, that the legislature understood and construed the original act as applicable only to local or State commerce, and sought by the supplemental act above mentioned to induce railroad companies to bind themselves by contract not to increase their charges upon inter-State commerce for the purpose of making up for their losses under the law upon State commerce.

If, however, the statute shall be held by its terms to apply to inter-State commerce, I am of the opinion that it is in contravention of article 1, § 8, of the constitution of the United States, which confers upon congress the power “to regulate commerce with foreign nations and among the several States.” The question is one of great importance, and, in some of its aspects, not free from difficulty. It has been much discussed in the courts of the country, and especially in the supreme court of the United States.

The following propositions may now be laid down as settled, at least so far as the federal courts are concerned.

(1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one State to a place in another is “commerce

among the States." (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one State to places in other States, is a regulation of commerce among the States. (5) The power to regulate such commerce is vested by the constitution in congress. (6) This power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. (7) The State cannot adopt any regulation which does or may operate injuriously upon the commerce of other States.

These general propositions are abundantly sustained by the following, among other, authorities: *Crandall v. Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283; *Gibbon v. Ogden*, 9 Wheat. 1; *Case of State Freight Tax*, 15 Wall. 232; *Welton v. Missouri*, 91 U. S. 279; *Hall v. De Cuir*, 95 U. S. 497; *Railroad Co. v. Husen*, Id. 469; *Pensacola Tel. Co. v. Western, etc., Tel. Co.*, 96 U. S. 9; *Carton v. Ill. Cent. R. Co.* 6 Am. & Eng. R. R. Cas. 305.

It is insisted by plaintiff's counsel, in his very able and exhaustive argument in this case, that, conceding the soundness of these propositions, the statute in question may be upheld upon the ground that in enacting it the State exercised a power which is vested concurrently in the States and the general government. That certain powers may be exercised by the States in the way of regulating inter-State commerce, where no act of congress is interfered with, may, for the purposes of this case, well be admitted.

Assuming such to be law, the questions remain:

(1) Whether the act in question, if applied to through shipments, or freight upon lines extending into or through several States, must not be held to relate to a subject which is in its nature national, or which admits of one uniform system or plan of regulation. (2) Whether, if the power of the State to pass such an act be conceded, it does not necessarily include the power to discriminate against the commerce of other States.

If either of these questions is answered affirmatively, then the statute, in so far as it relates to through shipments over inter-State lines, is in violation of the federal constitution. I am of the opinion that both questions must be so answered.

It seems very obvious that the regulation of transportation of merchandise over a line extending, it may be, from the Atlantic to the Pacific ocean, is a subject which is in its nature national. It is so because it necessarily concerns the people of the whole country, and is beyond the legislative power of any single State. It is also apparent that such transportation not only admits of, but requires, a uniform system or plan of regulation. I do not understand the plaintiff's counsel as denying these propositions; but he insists that this State may regulate charges upon so much of the

route as lies within its own territory. In other words, the contention of counsel is that each State over whose territory a line of inter-State railroad passes, may fix or limit the charges to be made for the carriage of a cargo upon that part of the route which lies within its own jurisdiction.

The consideration of this proposition involves a determination of the second question last above stated, viz., whether the statute in question, construed as authorizing the regulation of charges within this State, may not affect charges made for carriage in other States. To state the question in another form, it is this: Can each of the States through which a cargo must pass in going, for example, from Des Moines to New York City, fix the proportionate charge which shall be made by the carrier for the distance within its own territory? Such a line would pass through portions of the States of Iowa, Illinois, Indiana, Ohio, Pennsylvania, and New York. How can Iowa fix the amount to be paid for the carriage from Des Moines to the State line without indirectly affecting the rates to be charged in the other States? It must be borne in mind that the power to regulate includes not only the power to reduce, but the power to increase charges. If one of the States upon such a line can fix the charges for carriage within its own territory, what is to prevent it from authorizing its own carriers to demand and receive an undue and unreasonable proportion of the gross amount? If the proposition contended for be admitted, what is there to prevent the three States through which the cargo must first pass on its way to New York, from exacting more than one half of the charge for the entire route? or, to state the same question in another way, why may not the five States through which the cargo would pass before reaching the boundary of New York, exact in the aggregate the whole of a reasonable charge for the entire route, leaving nothing for the carrier within the State of New York? And since no State law can have any extraterritorial force, is it not clear that the attempt to enforce the statutes of each of the several States, in so far as the carriage within such State is concerned, would lead to conflicts and disputes which no State authority would be competent to adjust and determine?

These considerations, I think, lead inevitably to the conclusion, not only that such commerce is the subject only of national control and regulation, but that any attempt to devolve upon a single State the power to regulate it in part would necessarily give to such State the right to discriminate against other States of the Union.

It is well known that one of the chief reasons which caused the constitutional convention to insert the commercial clause in the constitution of the United States, was the belief that if the power to regulate commerce among the States was not taken exclusively into the hands of the national government, rivalries and jealousies

would arise among the States similar to those which had existed under the old confederation, which would lead practically to the destruction of inter-State commerce, and it was regarded as specially important that no power in the legislature of any one State to interfere with commerce or trade in any other State should be recognized as existing.

My conclusion is, therefore, that the statute in question, if held to apply to inter-State commerce, is in violation of the constitution of the United States. In this view I am supported by the recent decision of the supreme court of this State (*Carton v. Ill. Cent. R. Co.*, supra), in which the act now under consideration was held to be unconstitutional. If I were in doubt upon the subject, I should not hesitate to follow that ruling.

I am not aware that the federal courts have ever in the course of our history undertaken to enforce a State statute which has been held void by the supreme judicial authority of the State. I should hesitate long before undertaking to enforce in this tribunal any act of the State legislature which the supreme court of the State has held, for any reason, to be null and void. To do so would be to give to suitors who can come here an unjust advantage over the citizens of the State who are compelled to submit their rights to the determination of the State courts.

The demurrer to the answer is overruled.

Regulation of Inter-State Commerce.—The question raised in the principal case is one of the most interesting and important constitutional points which has arisen for some time in this country. The right of the States to pass laws which indirectly affect inter-State commerce is involved. Congress has not remained entirely passive upon the point. In 1866 it passed an act authorizing all railroad companies to transport passengers and freight from State to State, and empowering them to receive and accept reasonable compensation therefor. The existence of this statute must be borne in mind in the discussion which follows.

Regulation of Railroads Entirely within State.—A regulation of railroads which in its direct effect is confined exclusively to the business done within the State is clearly valid, although indirectly it may affect inter-State commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

A tax, therefore, on the gross receipts of a domestic corporation is valid, although such receipts are in part derived from the transportation of merchandise in and out of the State. *State Tax on Railway Gross Receipts*, 15 Wall. 284. An act requiring grain warehouses within the State to take out licenses, requiring such warehouses to post up their fixed rates of charge, prohibiting discrimination in charges, and fixing a maximum legal tariff, is not invalid, though it may indirectly affect inter-State commerce. *Munn v. Illinois*, 94 U. S. 113.

A law fixing a maximum rate of freight which may be charged by a railroad company is valid where the railroad is entirely within the State. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

Such a law is valid where the railroad is not entirely in the State, but the

act contains a special clause that it shall not be taken as referring in any way to inter-State commerce. *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

It must be conceded, however, that were Congress to pass any law relative to inter-State commerce with which the laws above adverted to would conflict in any way, however small, they would pro tanto become void.

What is Regulation of Inter-State Commerce.—Some State acts are so clearly a direct attempt to regulate inter-State commerce that they have been pronounced void. Thus an act prohibiting all railroad companies within a State from delivering goods or passengers to other railroad companies at any other point than within the State, is clearly illegal, as it necessitates a breaking of bulk on the border of the State. *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Ill. 338. An act prohibiting the transportation of cattle over the boundary of a State during certain months in the year, is invalid as a regulation of inter-State commerce. *Railroad Co. v. Husen*, 95 U. S. 465.

Police Power.—Certain regulations of railroads by a State have been sustained as a valid exercise of its police power, though they almost constitute a complete regulation of inter-State commerce. A law, therefore, which requires all railroad companies annually to fix their rates of freight and fare, and to post up the same in a conspicuous place, and forbidding charges in excess of the rates thus fixed under a penalty, is valid—and this though it is conceded that the act applies to goods carried in and out of the State as well as to those transported wholly within its borders. The act, the court says, makes no discrimination between local and inter-State rates. "It only requires that the rates shall be fixed, made public and honestly adhered to. In this there is nothing unreasonable or onerous." *Railroad Co. v. Fuller*, 17 Wall. 560, and see *Chicago & Acton R. Co. v. People*, 12 Am. & Eng. R. R. Cas. 156. And a statute which requires all railroad companies to draw the cars of other companies at reasonable times for reasonable compensation to be agreed upon by the parties or fixed by railroad commissioners, has been held to be valid. *Rae v. Grand Trunk R. Co.*, 9 Am. & Eng. R. R. Cas. 470. But see *Railroad Co. v. Husen*, 95 U. S. 465; *Hall v. De Cuir*, 95 U. S. 485.

Disputed Questions.—Whether a State law regulating the amount of freight which can be charged on a railroad—not a police regulation—and which affects inter-State commerce indirectly only—is or is not valid, is yet an undecided question. In *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 530, an action on the case was brought against a railroad company for a failure to furnish to the plaintiff equal express facilities with others for the transportation of goods from a point within the State of Maine to another point in the State of New Hampshire. It was objected by the company defendant that the plaintiff could have no right of recovery, since the unjust discrimination complained of had been partly in relation to the transportation of goods in another State. The court, however, overruled the objection, intimating that if the courts of Maine had objected to their taking jurisdiction they might have hesitated, but that in the absence of such objection they would grant the relief prayed for. Cf. *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407; *Chicago & A. R. Co. v. People ex rel.*, etc., 67 Ill. 11. In *People v. Wabash, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 628; s. c., 12 Am. & Eng. R. R. Cas. 10, the question was squarely met. In that case an act of the State of Illinois imposed a penalty upon railroad companies in general wherever there was an unjust discrimination in the rates of freight and fare charged. It was held that the act was generally applicable to contracts for the transportation of goods to and from points without the State, but its validity was nevertheless sustained upon the ground that in its application to such contracts it had reference merely to inequalities in the charges made for the distance traversed within the State. "Nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond

the limits of this State; a prima facie is made out of unjust discrimination under our statute occurring within the State."

The current of authority is, however, to a contrary effect. In *Hall v. De Cuir*, 95 U. S. 485, an act of the State of Louisiana was in question which prohibited discrimination by common carriers of passengers among persons of different race or color. It was admitted that the act would by its terms apply to carriers engaged in transporting passengers from State to State, and on that account it was pronounced void as an interference with inter-State commerce. The idea that the operation of the act can be construed to be limited to that part of the carriage within the State only is scouted. "While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. . . . It was to meet just such a case that the commercial clause in the constitution was adopted." In *Carton & Co. v. Illinois Central R. R. Co.*, 6 Am. & Eng. R. R. Cas. 305, the same reasoning is applied in the case of a statute fixing maximum rates of freight. Such statute must, it was held, be construed to apply to contracts for inter-State commerce and was in so far invalid. The same view was adopted in the principal case and will in all probability be taken by the Supreme Court of the United States. See *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, *supra*.

HEISERMAN et al.

v.

BURLINGTON, C. R. AND N. RY. Co.

(*Advance Case, Iowa. April 10, 1884.*)

The statute providing that the agent of a railway company shall be guilty of a misdemeanor for exacting and collecting excessive charges, does not take away the common-law right to recover money paid in excess of reasonable compensation. Protest prior to payment need not be shown.

The two-year statute of limitations applies to the action for the misdemeanor, and not to this action for the recovery of the excess, the period for which is five years.

The contract of a shipment of wheat from West Union, Iowa, to Milwaukee, Wisconsin, providing that the responsibility of the company receiving the grain should cease with the delivery thereof at Postville, Iowa, to a connecting line, is a contract to be wholly performed within this State, and not open to the objection that it relates to commerce between States, and therefore not within the scope of our statutes.

Where the measure of compensation is fixed by statute, no greater sum can be lawfully demanded or received, and all evidence that charges higher than those fixed by statute are reasonable, is immaterial and inadmissible.

APPEAL from Fayette Circuit Court.

Action at law to recover certain sums paid by plaintiff to defendant for the transportation of grain upon defendant's railroad in

excess of reasonable and just charges therefor. The cause was tried by the court without a jury, and judgment was rendered for defendant. Plaintiffs appeal. The facts of the case are fully stated in the opinion.

Stoneman, Rickel & Eastman for appellants.

J. & S. K. Tracy for appellee.

BROCK, J.—1. The petition alleges that between the twenty-eighth day of August, 1877, and the fourth day of February, 1878, the plaintiffs delivered to defendant, for transportation upon its railroad from West Union to Postville, Cedar Rapids, and Burlington, all points within this state, certain large quantities of grain to be delivered to connecting lines of railroads for transportation to Milwaukee, in the State of Wisconsin; that no other railroad than defendant's reached West Union, and plaintiffs were therefore compelled to procure transportation upon it; and that defendant charged and exacted large sums in excess of reasonable and just charges for the transportation of the grain, which plaintiffs were compelled to pay. The number of shipments, the quantity of grain in each, the charges paid, and the sums paid in each instance in excess of reasonable charges, and other particulars, are shown by an exhibit to the petition, which need not be more particularly noticed.

As defences to the action, defendant alleges—First, that the grain in question was transported by defendant as shipments from West Union to Milwaukee in "through" cars and upon "through" bills of lading, and that the contract for transportation pertained to commerce between the States, and that the statute of this State then in force, prescribing the charges which could be lawfully made for the transportation of property upon railroads, was therefore inapplicable and inoperative as to the transactions in question, being, as to them, in conflict with the constitution of the United States; second, that plaintiffs "knowingly, voluntarily, and willingly" paid the charges now claimed by them to be excessive and unreasonable; and, third, that the action is barred by the statute of limitations.

The defendant alleges in its answer that the charges of which plaintiffs complain were reasonable, and that the contracts for the transportation of the grain were to be performed by the delivery at Milwaukee, in the State of Wisconsin. The allegations of the pleadings in the case need not be further referred to or recited.

2. The evidence, without contradiction, establishes that it was the purpose of plaintiffs to ship the grain in question to Milwaukee or other points out of this State, and that it was delivered in the cars of defendant, or in cars in use upon its road, at West Union. The contract for transportation between the parties, in each instance, was expressed by an instrument in writing, in the following form and language:

"BURLINGTON, CEDAR RAPIDS & NORTHERN RY. Co.

"No. —, West Union Station, Nov. 15, 1877.

"Received from Heiserman & Herriman, in apparent good order, by the Burlington, Cedar Rapids & Northern Ry. Co., the following described packages, marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said railway, to be transported over the line of this railway to Postville, and delivered, after payment of freight, in like good order, to C., M. & St. Paul, a company or carrier (if the same are so forwarded beyond the line of this railway), to be carried to the place of destination; it being expressly agreed that the responsibility of this railway shall cease at this railway's depot, at which the same are to be delivered to such carrier; but this railway guarantees that the rate of freight for the transportation of said packages from the place of shipment to ——— shall not exceed ——— per———, and charges advanced by this railway:

Marks and Consignee—Chandler, Brown & Co.

Destination—Milwaukee, Wis.

No. Packages.	Description of Articles.	Weight.
1402	Bulk Wheat.	
B., C. B. & N.	U. or L.	

J. F. MILLER, Agent."

This contract, in the plainest language, provides for transportation to Postville and no further. While it provides for the delivery of the grain to another railroad company, yet defendant's obligation under the contract was fully performed when this was done, and by the express language of the instrument defendant's responsibility ceased when it delivered the grain to another carrier. The facts established by the evidence, that defendant's compensation was fixed by contract with its connecting line at Postville, and for the whole route taken together the charges were reasonable, and were less than was provided for by the statute of the State then in force, cannot affect or modify the controlling point in the case, namely, that the contract was wholly performed in this State by the delivery of the grain at Postville, and that it provided for transportation between points within the State, and did not extend to carrying the grain without the State. Discussion can add nothing to the conclusiveness of our position, based upon the obvious meaning of the contract.

3. It will be observed that this action is not brought to recover the penalties for overcharges by the railroad companies, provided by chapter 68, Acts Fifteenth General Assembly, in force when the acts complained of by plaintiffs were done. The plaintiffs seek to recover the sums paid by them in excess of reasonable charges, and nothing more. The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. See *City of Dubuque v. Ill. Cent. Ry. Co.*, 39 Iowa, 56; *City of Burlington v. B. & M. Ry. Co.*, 41 Iowa, 134; *Crittenden v. Wilson*, 5 Cow. 165; *Gooch v. Stephenson*, 13 Me. 371; *Candee v. Howard*, 37 N. Y. 653. The injured party may waive the tort created by statute and sue upon the implied contract raised by the law, whereby the carrier is obligated to repay to the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges, the whole business of the country would be subject to unjust exactions resulting in oppression to citizens, and destructive to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements. For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names, or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss; and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the

case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest where they would be unavailing and vain. The doctrines we have expressed are supported by the following authorities: *Chicago & A. Ry. Co. v. Coal Co.*, 79 Ill. 121; *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559; *Parker v. G. W. Ry. Co.*, 7 Man. & G. 253; *Harmony v. Bingham*, 12 N. Y. 99; *Chandler v. Sanger*, 114 Mass. 364; *Stephan v. Daniels*, 27 Ohio, 527; *Robinson v. Ezzell*, 72 N. O. 231; *Carew v. Rutherford*, 106 Mass. 1; *Lafayette & I. Ry. Co. v. Pattison*, 41 Ind. 312; *Philanthropic Building Ass'n v. McKnight*, 35 Pa. St. 470; *Wood v. Lake*, 13 Wis. 84; *Wheaton v. Hibbard*, 20 Johns. 290; *Thomas v. Shoemaker*, 6 Watts & S. 179; *Palmer v. Lord*, 6 Johns. Ch. 95; *State Bank v. Ensminger*, 7 Blackf. 105.

4. The action, as we have shown, is not brought to recover the penalty provided by statute, which is barred by the statute of limitations in two years. *Herriman v. B., C. R. & N. Ry. Co.*, 57 Iowa, 187; s. c., 9 Am. & Eng. R. R. Cas. 339. Being an action to recover upon an implied contract, it is not barred until the expiration of five years.

5. The statute in force at the time of the transactions in question (chapter 58, Acts Fifteenth General Assembly) fixed charges which could be lawfully made by railroad corporations for the transportation of property. Charges in excess of those prescribed were unlawful. This statute conclusively determines the charges which shall be considered reasonable. Unlawful charges, surely, will be regarded as unreasonable, for the courts cannot give protection for acts which are unlawful, and hold that such acts create or defeat rights. Courts will not, in this way, encourage the violation of statutes. In all cases where statutes fix compensation to be paid for services, recovery for a greater sum cannot be had on the ground that it is reasonable and just. The statute having fixed the measure of compensation, no greater sum could lawfully be demanded or received.

6. Certain evidence was admitted, against plaintiffs' objection, tending to show the amount of the charges upon the grain after it was shipped from the termini of defendant's lines of roads in this State, and that the charges paid defendant were reasonable. In order to establish these facts defendant was permitted to introduce evidence tending to show the contracts and arrangements existing between defendant and connecting lines for the transportation of property beyond the limits of the State, and other like matters. The evidence of this character, being immaterial, was erroneously admitted. The contract between the parties fixed the points within the State to which defendant became bound to transport the grain. The law fixed what must be regarded as reasonable charges

for defendant's services. All evidence tending to vary the express terms of this contract, or prove that charges higher than those fixed by the statute were reasonable, was incompetent.

The judgment of the circuit court is reversed, and the cause will be remanded for proceedings in harmony with this opinion.

See *Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee*, and note *supra*; and *Kaiser v. Illinois Central R. Co.*, and note *supra*.

SCOTT

v.

ERIE RY. Co. et al.

(34 *New Jersey Eq.* 354.)

A bill against several defendants for a discovery, accounting and repayment of alleged unlawful overcharges for freight, the liability therefor being purely legal and enforceable at law, cannot be sustained, on the ground that one defendant is liable as the lessee of several short lines of railroad, and that the other defendants, the lessors, are also liable, and that if complainant be compelled to resort to law for redress, he must sue each defendant for a fractional part of each overcharge.

BILL for relief. On final hearing on pleadings and proofs.

Mr. T. D. Hoxsey for complainant.

Mr. Cortlandt Parker for defendants.

CHANCELLOR RUNYON.—The bill is filed for an account of moneys alleged by the complainant to have been paid by him to the defendants, which are the Erie Ry. Co. and its lessors, the Paterson & Ramapo R. R. Co., the Paterson & Hudson River R. R. Co., and the Long Dock Co., in excess of the lawful charges for freight carried by the Erie Ry. Co., from Paterson to New York, for him, between the 1st of March, 1872, and the 1st of September, 1874. The bill states that the length of railroad between the depot at Jersey City and the city of Paterson is fifteen and sixty-three hundredths miles, which is made up of two and fifty-six hundredths miles of the railroad of the Long Dock Co., twelve and fifty-eight hundredths miles of the Paterson & Hudson River R. R., and forty-nine hundredths of a mile of the Paterson & Ramapo R. R.; and that the Erie Ry. Co., during all the period in respect of which the account is claimed, was operating that road under a lease from the railroad companies by which it was owned. The complainant insists that the latter companies are, as well as the Erie Ry. Co., by which the alleged excessive charges were made, and to which the payments were made by him, liable to and bound to repay

him. The answers of the defendants deny that the alleged illegal charges were made, and insist that all the charges complained of were lawful, and they also insist that the remedy of the complainant is at law. The prayer of the bill is that the Erie Ry. Co., the Paterson & Hudson River R. R. Co., the Paterson & Ramapo R. R. Co., and the Long Dock Co. may account with the complainant for the unlawful charges and tolls asked, demanded and received from him for freight and transportation between Jersey City and Paterson, either way, between the 1st day of March, 1872, and the 1st day of September, 1874; and that each of the three last-mentioned companies, as the lessor of the Erie Ry. Co., be held to so account with him in proportion to the unlawful charge so made by its lessee, the Erie Ry. Co., in proportion to the length of its road to the whole length of the road between Jersey City and Paterson; and that, therefore, the Long Dock Co., as a lessor, responsible for such overcharges, be held to pay the complainant with respect to two and fifty-six hundredths miles; the Paterson & Hudson River R. R. Co. with respect to twelve and fifty-eight hundredths miles, and the Paterson & Ramapo R. R. Co. with respect to forty-nine hundredths of a mile of the length of the whole road between those points. It prays, also, that the defendants may make discovery for all and singular the transactions and matters before stated, and that an account may be taken, by and under the direction and decree of this court, of the alleged unlawful charges, dealings and transactions complained of in the bill; and that, in taking the account, the Erie Ry. Co. be primarily charged for the full amount of such unlawful charges, and that the other railroad companies, its lessors, be held secondarily chargeable, on failure or default of the Erie Ry. Co. to pay the amount, in proportion to their respective responsibility for the same, in the manner before stated, as to the length of their respective roads and their lawful right to charge freights thereon, or in some other manner as may be decreed to be just and equitable by this court, and that such other and general relief may be granted in the premises as may be consistent with equity and good conscience.

It seems to me quite clear that no discovery is required. The bill is based upon the allegations of unlawful charges, made by the Erie Ry. Co. against the complainant, for carrying freights over the road. The amount of the lawful charge is stated, and the amount of the unlawful demand and the amount paid. No discovery can be required, with regard to these matters. The bill is filed really to recover from the defendants the amount of these alleged unlawful charges. The complainant insists that he is entitled to the aid of this court in the premises, on the ground that he is entitled, by law, to look to the lessors, as well as the lessees, for repayment of the moneys in question, and that if he were to have recourse to law for a remedy, he would be compelled to sue

each of the lessors for a fractional part of the amount. He claims, as before stated, that the Erie Ry. Co. is legally responsible for the excessive charges, and that the lessors of that company are also liable according to the proportions which their respective lengths of road bear to the whole. He was at liberty, therefore, to proceed at law against the Erie Ry. Co., or against its lessors. Their liability to him (if it exists) is a purely legal one, and the proportions of the amount of the excessive charges which they should repay to him can be as well established at law as in this court. Indeed, he has stated them with clearness in the bill, and prays for a decree according to the proportions which are so stated. This objection having been taken in the answers, there is no reason why it should not be regarded on the final hearing. It seems to be entirely clear that the remedy of the complainant is at law and not in this court. The bill, therefore, will be dismissed, with costs.

See *Steever v. Illinois Central R. Co.*, and note *infra*.

STEEVER

v.

ILLINOIS CENTRAL R. Co.

(*Advance Case, Iowa. December 11, 1888.*)

Parties equally in fault or equally violators of law can have no remedy against each other based upon contracts or transactions which are esteemed unlawful.

This principle is not modified by the degree of guilt of the violators of the law or the turpitude of the offence, nor does it have respect to the punishment inflicted, and when it is said that the parties must be equally guilty, in order to warrant its application, it is meant that each party must be guilty of the violation of law.

A station agent who, as such, receives for a railroad company and ships his own goods at a higher rate than is allowed by law, cannot maintain an action for the overcharges of freight paid by him, under chapter 68 of the Acts of the Fifteenth General Assembly.

APPEAL from Sac Circuit Court.

Action under chapter 68, Acts of the Fifteenth General Assembly, to recover the penalty therein provided, for illegal charges paid by plaintiff to defendant on account of goods transported upon its railroad. The cause was tried to the court without a jury, and upon facts found. Judgment was rendered for plaintiff. Defendant appeals. The facts of the case are fully stated in the opinion.

J. F. Duncombe for appellant.

Charles D. Goldsmith and Wright, Cummings & Wright for appellee.

BECK, J.—1. In the thirteenth count of defendant's answer it pleaded the following defence: "Further answering, defendant says that, during all the time for which plaintiff claims overcharges, he was the station agent of defendant, and was employed by the month as such station agent, and that, among other duties, it was his special duty to collect freight and passenger charges at Alta, a station on defendant's line of road, and this suit is brought to recover back overcharges under chapter 68, Acts of the Fifteenth General Assembly of Iowa, and the amounts claimed are for alleged overcharges under that law, on goods shipped by and to plaintiff while such station agent; and that, if any of the charges complained of were overcharges collected by said plaintiff while agent of defendant, in violation of said law, and such charges were charged by said plaintiff in violation of said law, and said charges were demanded by said plaintiff in violation of said law, and said plaintiff, as such agent, was the agent of a corporation operating a line of railroad within this State, and the collection receipt demanded for and charging of said sum claimed by plaintiff is so charged, collected, received, or demanded in violation of said law, as claimed by plaintiff, was done by plaintiff as agent of said corporation, this defendant, and the doing of the said several acts and of each of said several acts so done by plaintiff, was a criminal act, and each of said acts were criminal acts, and subjected plaintiff to fine or imprisonment for each of the several violations of said law, at the discretion of the court, as provided by section 11 of said chapter 68 aforesaid; whereupon defendant says that the plaintiff is estopped from recovering back any portion of said overcharges, if any, so as aforesaid made by him as agent of said corporation defendant, criminally, and by said act made a misdemeanor, and punishable as aforesaid by fine or imprisonment."

As the conclusions we reach upon the defence thus pleaded are decisive of the case, other allegations of the answer need not be recited. The circuit court found the facts applicable to this branch of the case in the following language: "The court further finds that during all the time for which plaintiff claims overcharges herein, he was the station agent of defendant at Alta station, employed by the month as such agent, and that, among other duties, it was his special duty to collect freight and passenger charges at such station on defendant's line of road; that this action is brought to recover overcharges under chapter 68 of the Acts of the Fifteenth General Assembly of Iowa; that the amounts claimed are all for overcharges under that law, for goods shipped by and to plaintiff while he was acting as such agent; and that all

of such overcharges were paid over by said plaintiff, while acting as the agent of defendant, to defendant."

The circuit court's conclusion of law upon the facts thus found is expressed by the record as follows: "Upon the sixth finding of fact the court finds the legal conclusion that, upon the facts therein found, the acts of the plaintiff in collecting and remitting such charges against himself, while acting in the capacity of agent for the defendant, did not render him criminally liable under the provisions of section 11 of chapter 68 of the Laws of the Fifteenth General Assembly; and the court further finds this conclusion on said finding of fact: that plaintiff, by reason of facts so found, is not estopped from recovering back all or any part of the overcharges claimed for herein." There is no ground for disturbing the finding of facts as above set out.

2. The question for our determination, which in our view is decisive of the case, is this: Does the doctrine of *par delictum* defeat recovery by plaintiff in this action? Under this familiar doctrine parties equally in fault or equally violators of law can have no remedy against each other based upon contracts or transactions which are esteemed unlawful. Thus, while one has paid money to the other, when such payment was unlawfully made or exacted, the party making it cannot maintain an action to recover it back. The law provides no remedy for one who bases his claim to recover upon the violations of its provisions. Chapter 68, Acts of the Fifteenth General Assembly, provided for the maximum rates of charges for the transportation of persons and property by the railroads of the State. Section 11 declares that "any officer, agent, or employee of any railroad company, person, or corporation operating a line of railroad within the State, who shall violate, or be a party to the violation of, any of the provisions of this act, or instrumental therein, shall be guilty of a misdemeanor, and shall be punished by fine and imprisonment; and that any person, corporation, or railroad company operating a railroad within the State, authorizing, directing, causing, permitting, or allowing any violation of the act by any officer, agent, or employee shall forfeit and pay to the person injured five times the amount, compensation, or charge illegally taken or demanded, or five times the amount of the damage caused."

Under this act plaintiff seeks to recover in this action, which is founded on the payment by plaintiff, and the execution and receipt by defendant, of illegal charges for the transportation of property. The plaintiff, as agent of defendant in receiving illegal charges, was guilty of a misdemeanor; the defendant, as a corporation, in requiring and exacting the payment of the charges, was guilty of a violation of law, and subjected to a penalty therefor. The difference in the punishments to be inflicted upon the agent and the corporation is accounted for by the fact that offences committed

by corporations cannot be punished by imprisonment. The doctrine of *par delictum* is not modified by the degree of guilt of the violators of the law, or the turpitude of the offence. Nor does it have respect to the punishment inflicted. When, therefore, the expression is used that the parties shall be equally guilty, in order to demand its application, the thought is conveyed that each party must be guilty of the violation of law. Of the guilt of the defendant there can be no question. Does plaintiff share in the guilt of violating the law? The facts are these: Plaintiff, as agent of defendant, received illegal charges from himself, and paid the same to defendant. He occupied a double position. He was agent of defendant, and an individual shipper. It is insisted that he paid the money to defendant as a shipper. Let this be admitted. But to whom did he pay it? To himself, as agent. The charges first went into his hands as agent, and as agent he paid them to defendant. In receiving the illegal charges as agent, he violated the law. He cannot shield himself from the consequences thereof by insisting that any of his acts in respect to the charges were individual transactions. The law has no respect to the relations of one who violates its provisions; and it will not make curious distinctions in order to relieve a law-breaker from the consequences of his act. It will not inquire whether the act was done as an agent or as an individual. Guilt follows the purpose to violate the law. The animus determines guilt, and it does not depend upon the relations of the individual.

3. It is insisted that defendant and plaintiff in the transaction were independent actors; that defendant was the oppressor and plaintiff the subject of oppression; and that, in the language of Lord Ellenborough (*Smith v. Cuff*, 6 Maule & S. 160), the defendant held the rod and plaintiff bowed to it. This would all be quite true were the fact of agency out of the way. But as agent plaintiff acted in receiving and remitting the illegal charges; he was himself the instrument of whatever oppression there is in the case; he held with his own hand the rod with which he chastised himself. His act was of the character of the act of the *felo de se*, who commits the crime of murder upon himself. The law will give him no remedy based upon his offence.

4. It is argued that as the statute was intended for the protection of shippers of goods by railways, and in the public interest, it ought to be enforced in this case. But the plaintiff, by his violation of the statute, as we have seen, cannot have its protection, and the public interest does not require that a law-breaker shall receive benefit through his own offence.

5. Finally, the plaintiff cannot make out his case except through the medium of the transaction wherein the illegal charge was paid and received, in which he was a party to the violations of the

statute. Under these circumstances the law will give him no remedy. Broom, Leg. Max. *692.

We reach the satisfactory conclusion that upon the facts as found by the circuit court plaintiff is not entitled to recover in this action. The judgment appealed from is therefore reversed.

Overcharges in Freight.—As to the right to recover overcharges in freight or penalties for making such overcharges, see *Scott v. Erie Ry. Co.*, 24 N. J. Eq. 354; *Kenneth et al. v. South Carolina R. Co.*, 15 S. C. 284; *McGregor v. Erie R. Co.*, 85 N. J. L. 289; *State v. Winona & St. Peter R. Co.*, 19 Minn. 484; *Fuller v. Chicago & N. W. R. Co.*, 81 Iowa, 187; *Paxton v. Illinois, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 591.

ATCHISON, TOPEKA AND SANTA FÉ R. R. Co. v. DENVER AND NEW ORLEANS R. R. Co.

DENVER AND NEW ORLEANS R. R. Co. v. ATCHISON, TOPEKA AND SANTA FÉ R. R. Co.

(110 *United States Reports*, 607.)

The provision in the Constitution of Colorado, that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes no greater obligation on a railroad company than the common law would have imposed upon it.

The provision in the Constitution of Colorado that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," only implies a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other, and does not of itself imply the right of connecting business with business.

At common law a railroad common carrier is not bound to carry beyond its own line; and if it contracts to carry beyond it, it may, in the absence of statutory regulations, determine for itself what agencies it will employ; and there is nothing in the provisions of the Constitution of Colorado which takes away such right, or imposes any further obligation.

A railroad company has authority to establish its own stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them, and in the absence of statutory obligations, it is not required in Colorado to establish stations for those purposes at a point where another railroad company has made a mechanical union with its road.

A provision in a State Constitution which prohibits a railroad company from discriminations in charges and facilities does not, in the absence of legislation, require a company which has made provisions with a connecting road for the transaction of joint business at an established union junction station, to make similar provisions with a rival connecting line at another

near point on its line, at which the second connecting line has made a mechanical union with its road.

A provision in a State Constitution which forbids a railroad company to make discrimination in rates is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting road, unless the conditions as to the service are substantially alike in both cases.

THIS was a bill in equity filed by the Denver & New Orleans R. R. Co., a Colorado corporation, owning and operating a railroad in that State between Denver and Pueblo, a distance of about one hundred and twenty-five miles, against the Atchison, Topeka & Santa Fé R. R. Co., a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley R. R. Co., a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Co. formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Co. to unite with the Denver & New Orleans Co. in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande R. R. Co., another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Co. between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans for Denver business.

It appeared that when the Atchison, Topeka & Santa Fé Co. reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Co., being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Co. for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line, which could

be worked with rapidity and economy, in competition with the old ones. In the division of prices the Denver & Rio Grande Co. was allowed compensation at the rate of a mile and a half for every mile of actual haul. As the distance from the Missouri River to Pueblo by this route was about the same as to Denver by the other routes, the through rates over this line to and from Denver were usually made about the same as the rates to and from Pueblo. This was necessary to compete successfully with other lines for Denver business. Afterwards another agreement, known as the "tripartite agreement," was entered into between the Atchison, Topeka & Santa Fé, the Denver & Rio Grande, and the Union Pacific R. R. Cos., by which rates were established between Denver and the Missouri River, and arrangements made for a division of business among those companies, and for the regulation of their conduct towards each other with a view to avoiding competition between themselves or from others.

In 1882 the Denver & New Orleans Co. completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver & New Orleans Co. erected at its junction with the Atchison, Topeka & Santa Fé platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Co. made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered to this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A., T. & S. F. R. R., or reached by either line; that a system of through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Co. continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Co. in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Co.

By the Constitution of Colorado, art. 15, corporations can only be formed in that State under general laws, subject to alteration and repeal, and the law under which the Pueblo & Arkansas Valley R. R. Co. was organized, conferred power, among others:

“Second. To cross, intersect, or connect its railroad with any other railway.

“Third. To connect at State line with roads of other States and Territories.

“Fourth. To receive and convey passengers and property on its railway.

“Fifth. To erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction and operation of said railway.

“Sixth. To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor.” General Laws of Colorado, 1877.

Sections 4 and 6 of article 15 of the Constitution of Colorado are as follows:

“SEC. 4. All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this State, and to connect at the State line with railroads of other States or Territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad.

“SEC. 6. All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employee thereof, shall give any pref-

erence to individuals, associations, or corporations in furnishing cars or motive power."

No other provisions of the Constitution or of the statutes of the State were referred to as affecting the questions involved in the suit.

A large amount of testimony was in the record as to the custom of connecting roads in respect to the interchange of business and the formation of through lines. From this it appeared that, while through business was very generally done on through lines formed by an arrangement between connecting roads, no road could make itself a part of such a line, so as to participate in its special advantages, without the consent of the others. Oftentimes new roads, opening up new points, were admitted at once on notice, without a special agreement to that effect, or in reference to details; still, if objection was made, the new road must be content with the right to do business over the line in such a way as the law allowed to others that have no special contract interest in the line itself. The manner in which its business must be done by the line would depend not alone on the connection of its track with that of the line, but upon the duty which the line as a carrier owed to it as a customer. No usage was established which required one of the component companies of a connecting through line to grant to a competitor of any of the other companies the same privileges that were accorded to its associates, simply because the tracks of the competing company united with its own and admitted of a free and convenient interchange of business. The line was made up by the contracting companies to do business as carriers for the public; and companies, whose roads did not form part of the line, had no other rights in connection with it, than such as belonged to the public at large, unless special provision was made therefor by the legislature or the contracting companies.

Upon this state of facts the Circuit Court entered a decree requiring the Atchison, Topeka & Santa Fé Co. to stop all its passenger trains at the platform built by the Denver & New Orleans Co. where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Santa Fé Co. to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Co. was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would

receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Co. or any other competitor of the Denver & New Orleans Co. for business. In short, the decree, as entered, establishes, in detail, rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in connection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Co. to place the Denver & New Orleans Co. on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and perhaps, the compulsory interchange of cars. See 9 Am. & Eng. R. R. Cas. 374; 12 Am. & Eng. R. R. Cas. 1.

From this decree both companies appealed; the Atchison, Topeka & Santa Fé Co., because the bill was not dismissed; and the Denver & New Orleans Co. because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Co. for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage.

H. C. Thatcher, Charles E. Gast, George R. Peck and William M. Evarts for the Atchison, Topeka & Santa Fé R. R. Co.

E. T. Wells for the Denver & New Orleans R. R. Co.

WAITE, C. J.—After reciting the facts in the foregoing language he continued:

The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Railroad companies are created to serve the pub-

lie as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Co. is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Co. for itself, and the Atchison, Topeka & Santa Fé Co. does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of Colorado, the Denver & New Orleans Co. has a constitutional right, which a Court of Chancery can enforce by a decree for specific performance, to form the same business connection, and make the same traffic arrangement, with the Atchison, Topeka & Santa Fé Co. as that company grants to, or makes with, any competing company operating a connected road.

The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of sec. 23 of the charter of the Baltimore & Ohio R. R. Co., given by Maryland on the 28th of February, 1827, Laws of Maryland, 1826, c. 123, which is in these words:

“That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the State.”

At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to

put carriages thereon, subject only to the payment of tolls and to reasonable regulations as to the manner of doing business, *Lake Sup. & Miss. R. R. Co. v. United States*, 93 U. S. 442 ; but that the word "connect," as here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Co., and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Maryland Laws of 1832, c. 175, sec. 16. The charter of the Baltimore & Ohio Co. was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the States to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was required, the additional requirement was not distinctly stated and defined by the legislature.

Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began at a very early day in the history of railroad construction. As long ago as 1842 a general statute upon the subject was passed in Maine, Stats. of Maine, 1842, c. 9 ; and in 1854, c. 93, a tribunal was established for determining upon the "terms of connection" and "the rates at which passengers and merchandise coming from the one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their relations have become more and more complicated, statutory regulations have been more frequently adopted and with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but we have found no case in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies.

No provision is to be found in any of the constitutions of the several States, having special reference to the government of railroad corporations, before that of Illinois, which was ratified by a vote of the people on the second of July, 1870. Sec. 12 of art. 11 of that Constitution is as follows :

"Railways heretofore constructed or that may hereafter be constructed in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed

by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads of this State."

During the same year an amendment to the Constitution of Michigan was adopted in these words:

"Sec. 1. The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State; and shall prohibit running contracts between such railroad companies, whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

The Constitution of West Virginia, adopted in 1872, contained (sec. 9, art. 11) an exact copy of sec. 12, art. 11 of the Constitution of Illinois, with an addition of these words:

"And providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties."

In 1873 a new Constitution was adopted in the State of Pennsylvania. Secs. 1 and 3 of art. 17 are as follows:

"Sec. 1. All railroads and canals shall be public highways, and all railroads and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination."

"Sec. 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the State, or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station; but excursion tickets may be issued at special rates."

Since that time new constitutions have been adopted in Alabama, Arkansas, California, Colorado, Georgia, Louisiana, Missouri, Nebraska, and Texas. In Georgia, sec. 2, art. 4, authority was given the legislature to regulate fares and freights and to prevent unjust discriminations; and in Nebraska, sec. 4, art. 11, the provision in the Constitution of Illinois was substantially fol-

lowed; but in Alabama, sec. 21, art. 13, Arkansas, sec. 1, art. 17, California, sec. 17, art. 12, Louisiana, art. 243, Missouri, secs. 12, 13, 14, art. 12, and Texas, sec. 1, art. 10, the whole of sec. 1, art. 12 of that of Pennsylvania is included without any material change of phraseology. In Colorado, however, while all the rest of that section is adopted, these words are omitted: "and shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination." And so, while the first sentence of sec. 3, art. 12 is included, in language almost identical, the last sentence, which provides that passengers and property shall be delivered at all stations at charges not exceeding the charges to a more distant station, is left out, and the following inserted in its place: "and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." Both these alterations are significant, and we cannot avoid the conclusion that their purpose was to leave the legislature free to act in the regulation of the duties of connecting roads towards each other as the public good might require, for it is always to be borne in mind that while constitutional provisions of this character are intended as securities for the rights of the people, they may operate also as limitations on the powers of the legislature. To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "interest, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to wit, the relative rights of the two companies at common law and under the Constitution as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;
2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and
3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor
2. That companies owning connected roads shall unite in

forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Co., as the lessee of the Pueblo & Arkansas Valley R. R., has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Co. comes to the Atchison, Topeka & Santa Fé Co. just as any other customer does, and with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a rail-

road company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Co. had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Co. to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case the Atchison, Topeka & Santa Fé and the Denver & Rio Grande companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Co. saw fit to make its junction with the Atchison, Topeka & Santa Fé Co. at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Co., and against the Denver & New Orleans, would be in effect to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the com-

pany with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made, depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Co. to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Co. to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Co. in respect to the regular Pueblo rates; neither is there anything except the through rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande

on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Co. and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande.

Our attention has been called to several cases in the English courts where the question of reasonable or unreasonable preference by railway companies has been considered, but they all arose under the "Railway and Canal Traffic Act, 1854," 17 and 18 Vict. c. 31, and furnish but little aid in the determination of the present case. They are instructive and of high authority as to what would be undue or unreasonable preferences among competing customers, but none of them relate to the rights of connected railroads where there is no provision in law for their operation as continuous lines for business. And here it is proper to remark that in the very act under which these cases arose it is provided that "every railway company working railways which form part of a continuous line of railway communication. . . . shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other, without any unreasonable delay, and without any preference or advantage, or prejudice or disadvantage, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways of the several companies, be at all times afforded to the public in that behalf." If complaint was made of a violation of this provision, application could be made to the courts for relief. Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done, and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy.

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination.

None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do with this case as it is now presented. The question here is whether the Denver & New Orleans Co. would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to dismiss the bill without prejudice.

WELLS, FARGO & Co.

v.

OREGON RY. AND NAVIGATION Co.

(Advance Case, U. S. Circuit Court, District of Oregon. 1883.)

Exceptions to a bill for impertinence will not be allowed unless it is clear that the matter excepted to cannot be material to the plaintiff's case; and matters which may be so material are not necessarily impertinent, because they are such as the courts may judicially take notice of; nor is it necessarily impertinent in a bill for an injunction to refer to recent adjudications of the question involved, in similar cases in other courts.

By an act of the legislature of Colorado of February 5, 1876, certain persons were incorporated as the "Holladay Overland Mail and Express Co.," with the privilege and power to change its name by an "order" of its directors "approved" by the stockholders, and the bill alleges that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was afterwards approved by the legislature by the act of January 26, 1872: *Held*: (1) That until the contrary appears it should be presumed that the final action of the stockholders was had in pursuance of the order of the directors; (2) That the essential act in the proceeding was the vote of the stockholders to which the order of the board was only preliminary, and, therefore, that portion of the act providing for such order ought to be considered merely directory; and (3) *Semble*,

That the act of 1873, approving the change, is not in conflict with sec. 1869 of the R. S., forbidding the legislature of Colorado from granting "private charters or especial privileges."

This term is probably a sufficient description of the accommodation or service which a railway or other transportation company is expected, and may be required to furnish a person or corporation engaged in the express business.

This business has come to be a recognized branch of the carrying trade, of which the court will take notice; and a railway or other corporation created by the State to serve the public as a common carrier, is bound to furnish the usual and proper facilities to persons engaged in such business, who are so far the agents, bailees and representatives of the public.

The circuit courts of the United States are co-ordinate tribunals, constituting a single system, and the decision of one of them, deliberately made, ought usually to be regarded as decisive of the question involved, until otherwise determined by the supreme court.

Section 36 of the incorporation act (Or. Laws, 532), which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons and property thereon as it may prescribe," authorizes such corporation to take reasonable tolls, not inconsistent with its character and obligation as a common carrier, and no more; and so far, it constitutes a contract between the corporation and the State, the obligation of which the latter cannot impair nor any court disregard.

What is reasonable compensation under said sec. 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction requiring a railway corporation to furnish an express company with facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rate.

Clarence A. Seward, F. W. Fechheimer, and J. R. Lewis for the plaintiff:

Joseph N. Dolph and J. F. McNaught for the defendant.

DEADY, J.—These suits were commenced on December 11, 1882, and on the same day an order was made in each requiring the defendant therein to show cause why a provisional injunction should not issue, as prayed for in the bill; and, also, that in the mean time the defendants be so restrained.

On January 25–6 the motions for provisional injunctions were heard at length—all the questions which can or may arise in the case being argued by counsel with much zeal and ability.

Contemporaneous with these, a similar suit was commenced by the plaintiff in Washington Territory against the Northern Pacific Ry. Co., and by an understanding between court and counsel a motion for an injunction was heard in that case at the same time with the Oregon cases—Mr. Ch. J. Greene of that territory, in whose court the case is pending, being present at the hearing.

It appears from the bill in each case that the plaintiff is a cor-

poration organized under the laws of Colorado and engaged in the express business on the Pacific coast and elsewhere to the eastward of the Rocky Mountains, including the country traversed by the lines of the defendant's railways, steamboats and steamships in Oregon, Washington, Idaho, California and British Columbia; and has been such corporation and so engaged since February 5, 1876, when it succeeded to the express business carried on by Henry Wells, William G. Fargo and four others between New York and San Francisco and elsewhere on the Pacific coast, since March, 1852.

The defendants, the Oregon Ry. & Navigation Co., and the Oregon and California Ry. Co. are corporations formed under the laws of Oregon with their principal places of business in Portland, and engaged in the business of a common carrier of freight and passengers; and as such corporation the former owns and operates certain lines of railways, steamboats and steamships in Oregon, Washington, California and British Columbia, and the latter owns and operates certain lines of railway in Oregon.

It is alleged in the bills that heretofore the plaintiff has been furnished by the defendants with all the necessary facilities for doing its express business over and upon their said lines of transportation, for which it has paid them a stipulated price, but that now the defendants refuse to furnish such facilities any longer and have notified the plaintiff that hereafter they intend to do the express business on their lines of transportation, themselves; and that such refusal would work an irremediable injury to the plaintiff.

The defendants filed exceptions to the bills for impertinence which were heard and submitted at the same time with the motions for the injunctions. They are numerous and include a large portion of the allegations contained in the bills, such as: (1) Matters which the court can judicially know; (2) The extent, value and importance of the express business in the United States and the circumstances under which it has grown up and been transacted; (3) The usage and past conduct of railway companies in relation to the same; (4) The citation and quotation of acts of Congress concerning or recognizing the express business; and (5) the averments concerning prior injunctions allowed by the courts in similar cases.

An allegation will not be expunged from a bill as impertinent unless its impertinence clearly appears, for if it is erroneously struck out the error is irremediable. Story's E. P. sec. 267.

Consistent with this rule I don't think these exceptions ought to be allowed. It may be material to a full and proper presentation of the plaintiff's case to allege the existence of facts within the judicial knowledge of the court, and if so, they are pertinent thereto. The fact that they may be proved by reference to the

judicial knowledge does not dispense with the averment of them or render such averment impertinent.

So in regard to the allegations concerning the business in which the plaintiff is engaged, and is seeking by this means to protect—the facts concerning its origin, growth, value, importance and relation to the public and transportation company, such as the defendants, may all be material to a proper understanding of the plaintiff's case, and if so, they may be stated with reasonable fullness in the bill. And this rule is more especially applicable to cases like these, which although not exactly of first impression, involve the application of established rules and principles to new and important instances arising out of comparatively recent but radical changes in the methods and circumstances attending the transit, receipt, transportation and delivery of a very large amount of the valuable personal property in trust over the country.

Concerning the injunctions alleged to have been recently allowed in several of the U. S. circuit courts in similar cases, the matter is undoubtedly a proper one for the consideration of the court, as the adjudication of co-ordinate tribunals, and my impression is that it may as well be brought to the attention of the defendants and the knowledge of the court in this way, as similar adjudications, to which the plaintiff is a party, commonly are, in suits for infringement of patents. *Curt. Eq. Prec.* 30; *Curt. L. of Pat.* 544.

In answer to the applications for the injunctions the defendants filed the affidavits of their respective managers; but neither of these contradict nor qualify the facts here stated except in one particular. The affidavit of the manager of the O. & C. Ry. Co. denies that the plaintiff has been notified that it would no longer be allowed express facilities on its lines of railway, but on the contrary avers that the plaintiff has a contract with said defendant for said facilities until November 1, 1883, as far south as Roseburg, but not over the extension being constructed to the southern boundary of the State, and, then completed to Riddles station some twenty-six miles south of Roseburg.

But it appears from the affidavit of the president of the plaintiff that he was informed by the president of the N. P. Ry. Co., and both the defendant corporations in November, 1882, that the notice to the plaintiff from the O. R. & N. Co. to the effect that it would not be allowed express facilities on its lines of transportation after December 31, 1882, except upon the steamships running between Portland and San Francisco, would lead to the same result in the case of the O. & C. Ry. Co., and that his board had determined to conduct the express business on the lines of the N. P. Ry. Co., and those of the defendants for themselves.

Upon the facts then, I think it may be concluded that the defendants intend and will, unless restrained therefrom, withdraw

from the plaintiff on their lines of transportation, all the express facilities heretofore afforded it, for the small portions of such lines which may not be included in that purpose at present would be of no benefit to the plaintiff if excluded from the remainder.

But upon the case made by the bills, counsel for the defendants object to the allowance of the injunctions, because: (1) It does not appear that the plaintiff is a corporation or has capacity to sue. (2) The statement as to the facilities heretofore afforded the plaintiff, and which will hereafter be required for the transaction of its business is insufficient. (3) The defendants cannot be required under their articles of incorporation and the laws of the State to afford the plaintiff the facilities demanded or to give it a preference over other shippers in the transportation of freight. (4) If the plaintiff is entitled to a continuance of the facilities heretofore afforded it over existing lines, it is not as to future extensions of such lines; and (5) The court has no power to determine the compensation to be paid by the plaintiff to the defendants for express facilities.

It is admitted that the plaintiff was, on February 5, 1876, duly incorporated by an act of the legislature of Colorado of that date as "The Holladay Overland Mail and Express Co.," but it is claimed that the subsequent attempt—November 12, 1866—to change its name to "Wells, Fargo & Co.," failed of its purpose, and therefore there is no corporation of that name.

It appears that sec. 11 of the act incorporating the H. O. M. & E. Co., contained a provision that "said company may change its name whenever the same shall be ordered by the vote of a majority of the board of directors thereof, at a meeting duly convened for that purpose: Provided, such change is approved also by a majority of the stockholders in interest at a meeting duly convened for that purpose by a call from the president of the company."

The bills allege that "on November 12, 1866, and pursuant to the power conferred by sec. 11 of said act of incorporation, the stockholders of the said 'Holladay Overland Mail & Express Co.' duly changed its said corporate name to the name of 'Wells, Fargo & Co.;' and such change was duly approved by an act of the legislature of Colorado, passed January 26, 1872."

The argument for the defendant upon this point is, that a stockholder's meeting could not change the name of the corporation, because the act provided that the change should take place by the act of the directors with the approval of the stockholders. In support of this construction of the act counsel cites *Wallamet Falls Co. v. Kittridge*, 5 Saw. 48, in which case, this court held that under sec. 19 of the Oregon corporation act (Or. Laws, 528), which provides that a meeting of the stockholders of a corporation may "authorize the dissolution" thereof, that such vote did

not dissolve the corporation but only empowered the directors, by whom all the powers of the corporation were exercised unless otherwise specially provided (Or. Laws, 526, sec. 9), to take the necessary steps for its dissolution and winding up of its affairs.

But the cases so far from being parallel, are just the reverse. The Colorado act gave the preliminary action in the matter to the directors and the final effective action to the stockholders, while the Oregon act gives the initiative to the stockholders and the actual determination of the question to the directors.

My impression is that upon the facts stated the name of the corporation was duly changed.

And first, it is alleged to have been done by the stockholders "pursuant to the power conferred" on them by the act authorizing the change, that is, according to it, and to have been "duly" done by them, that is, according to law. Upon these allegations, and until the contrary appears, I think it ought to be presumed that the action of the stockholders was taken after the preliminary order of the directors rather than without it.

And second, taking into consideration the whole provision on the subject of changing the name and the reason of it, the act ought to be construed as practically giving the power to make the change to the stockholders absolutely, with or without the preliminary order of the directors. The latter are not authorized to change the name but to make an order that it may be done by the "company," and then comes the proviso and gives the final power over the subject to the "stockholders." The directors are the mere agents of the stockholders and the clause giving them authority to order the change becomes a mere regulation of convenience concerning the method and order in which the thing is to be done and not the essence of it. It is, therefore, merely directory. *Sprigg v. Stump*, 7 Saw. 286 and cases there cited.

In *Rex v. Loxdale*, 1 Burr, 447, Lord Mansfield said: "There is a known distinction between the circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory."

It is not necessary, therefore, to consider what was the effect of the act of January 26, 1872, purporting to legalize the alleged change of name. For the defendants, it is contended that the act is invalid as being in conflict with sec. 1 of the act of March 2, 1867 (14 Stat. 426, sec. 1889 R. S.) forbidding the legislature of a territory "to grant private charters or special privileges," but permitting it to provide for the formation of corporations by "general corporation acts."

This argument assumes that a legislative act naming or changing the name of a corporation is so far an act authorizing the formation of a corporation—a calling it into existence or conferring upon it a special privilege, and *Newby v. The Or. Cen.*

Ry. Co. (1 Deady, 616) is cited as showing that "the corporate name is a necessary element of the corporation's existence" without which "a corporation cannot exist."

But this remark must be considered as made with reference to a corporation formed under the corporation act of Oregon, sec. 4 of which (Or. Laws, 525) expressly provides that the articles of incorporation "shall specify the name assumed by the corporation and by which it shall be known."

And yet the law might provide that A. B. and C. should constitute or be formed into a corporation for any lawful purpose without any special name or designation. From the necessity of the case it would have to be described rather than named, as A. B. and C., a corporation duly created or formed at a certain date for a certain purpose, and in time it might acquire the name of the "A. B. and C." railway, or steamboat company, as the case might be.

I doubt, then, if sec. 1889 of the R. S. does prohibit a territorial legislature from naming or changing the name of an existing corporation, because such act is not a "charter" creating a corporation or one conferring a "special privilege" within the meaning of the section. To name a corporation is not to create it any more than a person. Nor does it confer on it a special privilege. The privilege of having a name is not thereby monopolized or exhausted, but may be enjoyed by every corporation that has wit enough to devise one, upon the same terms. See *Southern Pacific Ry. Co. v. Orton*, 6 Saw. 185.

But the attempt to legalize the change of name may be said to be an admission of its invalidity. Yet it must be considered that the matter of the change is lumped in the legalizing act with changes in the capital stock and other "acts and proceedings of the corporation," and therefore the validation of the change of name may have had very little to do with the passage of the act. And this suggestion gets force from the recital in the preamble to the act, to the effect that the name had been changed to Wells, Fargo & Co. by "the board of directors and stockholders."

As to the insufficiency of the statement of the facilities allowed the plaintiff on the defendants' lines, and which will hereafter be required thereon for the transaction of its business, my impression is that the bills are probably explicit enough, though I think they might well have been made more so.

But "express facilities" is a term which, from the nature of things, must by this time be pretty well understood between the parties most interested—the express company and the railway company.

As interpreted by the customs and usages of these parties, and sanctioned and adopted by the decisions of the courts, these facilities may be said to include the right to enter depots and stations

with loaded and empty wagons, the use of the platforms and space for the loading and unloading of express freight, sufficient space in suitable cars drawn in passenger or quick trains for the transportation of such freight, and a messenger in charge thereof, with room for its assortment while in transit, and a sufficient delay at stations for the delivery and receipt of express matter. *Southern Express Co. v. Iron, etc., Ry. Co.*, 10 Fed. Rep. 213, 869; *Southern Express Co. v. Memphis, etc., Ry. Co.*, 2 Am. & Eng. R. R. Cas. 639.

"Express facilities," from the nature of the business cannot be limited to a definite space, but must correspond in this and other particulars to the public want and convenience to which the express company ministers.

In these cases there can be no difficulty for the present in ascertaining the facilities required by the plaintiff. For the purposes of this application they are such as it has heretofore been allowed. Under the restraining orders allowed on the filing of the bills, the defendants are now furnishing and the plaintiff is receiving just such facilities without any inconvenience to either party.

But the third objection, that the defendants cannot be required, under their charter and the laws of the State, to afford the plaintiff the facilities demanded, or to give it a preference over shippers in the transportation of freight, is the one principally relied on by the defendants to defeat these applications for injunctions.

Upon this point the arguments and brief of counsel for defendants have left nothing unsaid in their behalf.

Briefly, the argument is this: At common law, while a common carrier must carry for all at a reasonable compensation, which must be settled by the courts if not agreed on by the parties, still he may discriminate in his charges by carrying, in some instances, for less than a reasonable compensation if he chooses. There is no statute in Oregon changing this rule of the common law, or requiring a corporation to transport freight in a passenger train and in the custody or under the control of the shipper, therefore the defendants cannot be required to carry freight for the plaintiff at the same rate they may for others, or to furnish it any such facilities. In short, it is denied that either under the laws of Oregon or the past dealings between the parties, "it is the duty of the defendants to permit an express business to be done over their lines of transportation at all in the manner required by the plaintiff," and, therefore, they may refuse to do so if they please.

In passing upon this question, at this preliminary stage of these cases, I do not deem it necessary to do more than to state my impression of the law as applicable thereto.

In the case of the *Southern Express Co. v. St. Louis, etc., Ry. Co.*; *Same v. Memphis, etc., Ry. Co.*; *Dinsmore v. Missouri, etc., Ry. Co.*; *Same v. Atchison, etc., Ry. Co.*, *Same v. Denver, etc.,*

Ry. Co., 3 Am. & Eng. R. R. Cas. 594, arising in Missouri, Arkansas, Kansas, and Colorado, and lately heard together at St. Louis before Mr. Justice Miller, of the Supreme Court, and Circuit Judge McCrary, the defendants were perpetually enjoined from refusing or withholding the usual express facilities from the plaintiffs.

In the opinion delivered by Mr. Justice Miller, it is stated that "the express business is a branch of the carrying trade that has by the necessities of commerce and the usages of those engaged in transportation become known and recognized," and sufficiently so "to require the court to take notice of it, as distinct from the transportation of the large mass of freight usually carried on steamboats and railways;" and "that the object of this express business is to carry small and valuable packages rapidly in such a manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like." And also that—"It has become law and usage, and is one of the necessities of this business that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it;" without any right on the part of the railway company "to open and inspect" them; that it is "the duty of every railroad company to provide such conveyance by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business at fair and reasonable rates of compensation," to be determined by the court where the parties cannot agree thereon; and that a court of equity "has authority to compel the railroad companies to carry this express matter and to perform the duties in that respect" as indicated.

Substantially the same conclusion has been reached by several other judges in the United States circuit courts in the same and similar cases reported in 2 Fed. Rep. 465; 3 Id. 593; Id. 775; 4 Id. 481; 6 Id. 426; 8 Id. 799.

The only case cited from the decisions of the federal courts to the contrary of these is *Chamblos v. Pa., etc., Ry. Co.*, 4 Brewster, 563, in which a preliminary injunction was refused by Judge McKennon in a similar case; and also the case of *New England Express Co. v. Maine, etc., Ry. Co.*, 57 Maine, 194; and *Sargent v. Boston, etc., Ry. Co.*, 115 Mass. 416, in which the right of an express company to what are known as express facilities on the defendant's roads were denied.

But the very decided weight and number of these authorities recognize the existence of the express business and the right of

those engaged in it to have the proper facilities therefor allowed them by the defendants and to secure the same by injunction in case they are refused.

Until this question is settled by the supreme courts, these deliberate decisions of co-ordinate tribunals, like the circuit courts, ought, except in an extreme case, to furnish a guide for the decision of this court.

This is the rule that has been followed by justices of the supreme court on the circuit; *Washburn v. Gould*, 3 Sto. 133; *Brooks v. Becknell*, 3 McLean, 250; *American, etc. Co., v. Fiber, etc., Co.*, 3 Fisher, 363; and in *Goodyear, etc., Co. v. George Milles et al.*, 7 Pat. Off. Gaz. 40, Judge Emmons examines the question at some length, and concludes, that, "If one system of co-ordinate courts more than another, calls for the application of these general principles, it is that of the circuit courts of the United States. . . . Although divided in jurisdiction, geographically, they constitute a single system, and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand that it should be followed until modified by the appellate court."

However, my own impressions of the law are in harmony with these rulings.

If the defendants were merely private common carriers, and the fact being admitted, which is manifest, that within the last thirty or forty years persons or organizations known as expressmen or express companies have grown up in the country and introduced and are conducting the business of transporting a class of comparatively small but valuable packages over railway lines in special cars attached to passenger trains in the charge of an agent—the same being collected and delivered by said companies at points beyond the line or termini of the railway—it would be their duty to furnish the usual facilities for such transportation over their lines. The obligation of a common carrier, as that of others who serve the public, may vary with the condition and circumstances of society. What is suitable and convenient in one age is not in another. The individuals who constitute the public have found it convenient to employ the express companies to transport certain articles for them instead of attending to it in person. So far, then, these companies represent the public, and as it has become an established usage and common method in the carrying trade to transport such packages in the charge of the shipper in a special car on passenger time, they have the same right to demand and receive these facilities at the hands of the defendants as would any one of the individuals whom they represent.

But the defendants are common carriers and more. They are also corporations created by the State for the public use, and may be compelled to perform their corporate functions accordingly.

True, the stock of the defendants is private property, and their business is directly managed by private persons of their own selection. But, nevertheless, the prime purpose of their creation and existence is to furnish the public suitable and convenient facilities for transportation of freight and passengers. It is the business of the State to establish and maintain highways as means of transportation and communication within its borders, and to this end it created these defendants—authorized them to condemn private property to their use, to construct and operate their roads, and to take tolls for carrying freight and passengers thereon. *Talcott v. The Township of Pine Grove*, 1 Flipper, 144; *The People v. The N. Y. Central Ry. Co.* (N. Y. Supreme Court), *The Daily Register*, Feb. 10, 1883; *Railway Co. v. Maryland*, 21 Wall. 470.

The defendants having been created by the authority of the State to serve the public as common carriers cannot lawfully omit or refuse to perform their duty in this respect. They exist to do the business of a common carrier, and to do it in that way and manner which the law directs or the well-established usage of the country requires. For this service they are entitled to a reasonable compensation. But it can make no difference to them whether such compensation is paid directly by the owner of the package transported or by the plaintiff as his bailee and agent.

Neither is the business of the plaintiff in any sense or degree a burden or tax upon the corporate facilities or resources of the defendants. On the contrary, it is from the very nature of things, of benefit to them. For, by reason of the special means it uses to collect, care for in transit, and deliver the freight confided to its custody on and beyond the line of the railway, it must contribute materially to the volume and value of the business done thereon.

In considering this phase of the question, I have laid out of view the allegation that the plaintiff has expended time and money in building up its express business on and over the defendants' lines of transportation, which it would be unjust and inequitable now to deny it the further use and benefit of. And I rest my conclusions on the fact, as stated by Mr. Justice Miller, that the express has become a recognized branch of the carrying trade, and therefore the defendants being corporations required and authorized by the State to serve the public as, and transact the business of, common carriers, are bound to furnish the plaintiff, as the agent, bailee, and representative of the public, so far, with the proper and usual facilities for doing this branch of such trade.

This makes it unnecessary to consider the fourth objection of the defendants, that the plaintiff is not by reason of the facilities heretofore afforded it on existing lines of transportation, entitled to the relief sought as to any future extensions thereof.

And this brings me to the consideration of the fifth and last objection—that the court has no power to determine the compensa-

tion to be paid by the plaintiff to the defendants for the service demanded.

Counsel for the defendants rest this objection on the ground that the State in and by sec. 36 of the corporation act has contracted with the defendants that they may charge such tolls as they may see proper, and that therefore they cannot be required to carry freight for the plaintiff on any other terms or conditions.

Section 2 of Article XI of the State constitution is also cited. It provides that corporations, except municipal ones, shall not be created by special laws; and "All laws passed pursuant to this section may be altered, amended, or repealed but not so as to impair or destroy any vested corporate rights."

Section 36 of the corporation act (Or. Laws, 532) provides: "Every corporation formed under this chapter for the construction of a railway, as to such road, shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for the transportation of persons or property thereon as it may prescribe."

It is not apparent that this constitutional provision has any bearing on the question under consideration. The legislature has not undertaken to repeal or modify sec. 36 of the corporation act and this court is bound in the mean time to allow it full force and effect. If it constitutes a contract between the State and the defendants, by which they are absolutely and perpetually authorized to fix their own charges for transportation, as claimed by their counsel, it is protected from hostile legislation by sec. 10 of Art. I of the federal constitution.

But if it is not a contract at all, but a mere permission for the time being, then it is not a vested right, but a matter subject to the power of the legislature. However this may be, it is in the mean time a law of the State applicable to the subject of the right of the defendants to take tolls, which this court must construe and give effect to accordingly.

And first—the right to take tolls on a highway is an attribute of sovereignty, and cannot be exercised by the defendants without the authority of the State. It may be said that the authority to form a corporation to construct and operate a highway, as a common carrier, impliedly gives the right to take reasonable tolls for traffic thereon. But this has not always been conceded, and it is probable that the clause concerning tolls was inserted in this section primarily to authorize the taking of tolls at all, and then, for the time being, at least only in such amount as the corporation might prescribe—that is fix and set down beforehand, and not according to the whim or caprice of each occasion. *Charles River Bridge v. Warren Bridge*, 11 Pet. 544. Again, the legislature in enacting this section is presumed to have acted with knowledge of and reference to the fact that by the common law a common car-

rier was only entitled to a reasonable compensation for his services.

The reasonable inference from the circumstances is that the legislature, in consideration of the premises, intended to confer upon the corporation so long as it maintained and operated its road as a highway, conducted by a common carrier, at least the authority to take reasonable tolls. In other words, the duty and obligation of a common carrier being imposed on the defendants they were granted the corresponding privilege of charging a reasonable compensation for their services.

And so far, I think this section is a contract between the State and the defendants, the obligation of which it is beyond the power of the latter anyway to impair (sec. 10, Art. I., U. S. Con.), or any court to disregard.

But in my judgment the section was not intended to do more than this, and ought not to be otherwise construed. It is a license or grant to the defendants upon sufficient consideration to take such tolls for freight and passengers as are consistent with the duty and obligation they owe to the public as common carriers.

It is well settled that a grant of this kind is never to be construed beyond its plain terms or contrary to the manifest reason of it. And if there is a reasonable doubt as to its scope or meaning, that doubt must be resolved in favor of the public or State. *Charles River Bridge v. Warren Bridge*, supra, 544, 600; *Cooley's Con. Lim.* 394, and the cases there cited.

And this question seems in effect to have been similarly disposed of by Mr. Justice Miller in the case of the *Southern Express Co. v. St. Louis, etc., Ry. Co.*, 10 Fed. Rep. supra. For, in the answer of the defendant, as appears from a quotation therefrom in the brief of counsel for the plaintiff, it is stated that under its charter it was authorized to transport all articles usually carried on railways, and "to charge and to receive such tolls and freights" therefor "as shall be to the interest of the same, and that the directors of the defendant are therein authorized to establish such tolls, and to alter the same from time to time," and in the opinion allowing the final injunction he says (10 Fed. Rep. 215): "I am of the opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies."

Under the circumstances, this language can only be understood as a decision that the grant to the Missouri corporation to take tolls in similar if not stronger language than the Oregon one, is to be taken and considered as a grant to take only reasonable tolls.

The question of the power or right of the defendants to engage in the express business at all, at least the accessorial service of collecting and distributing packages off their lines of transportation, has been argued also, but it is not necessary now to consider it.

The plaintiff does not ask to exclude the defendants from the business, but only that it may be permitted to carry it on, as heretofore.

On the whole, I am of the opinion that the plaintiff is entitled to the relief sought and therefore ought to be secured by injunction until the final hearing, in the use of the facilities for conducting its business heretofore allowed it by the defendants.

A special reason for allowing the provisional injunction is also found in the fact, that by exacting the proper security from the plaintiff, the defendants will not be injured, even if it should be finally determined that the plaintiff is not entitled to relief; while if the injunction is not allowed, its business will be like water spilled on the ground—irredeemably destroyed. *Kerr, Injunctions*, 212.

The defendants being secured by the operation of sec. 36 of the corporation act, as now construed, in the right to take reasonable tolls, the question of what is reasonable, must, unless the parties can agree about it, be determined by the court.

But for the purpose of the provisional injunction the court will assume that the compensation heretofore paid by the plaintiff to the defendant for express facilities is reasonable, and will require the defendants to furnish them during the pendency of the suit or until the further order of the court upon their lines of transportation and the extensions of them, at the same rates.

Let an injunction issue commanding and restraining the defendants in each case as prayed for in this bill, the plaintiff first giving bond with sufficient sureties to be approved by the master of this court in the sum of \$20,000, conditioned to pay the defendant a reasonable compensation from time to time for such facilities, as heretofore, and all damages which the defendant may sustain by reason of this injunction, if the same shall be adjudged wrongful, to be ascertained by a referee or otherwise, as this court may direct, *Russel v. Farley*, 105 U. S. 443.

FIELD, J.—The bill of complaint alleges that the plaintiff is a corporation organized under the laws of Colorado, and is engaged, and has been for many years, on the Pacific coast and in other parts of the country, in what is known as the express business. The defendants are corporations formed under the laws of Oregon, and own steam vessels which ply on the waters of British Columbia, Oregon and California, and on the ocean along the Pacific coast, and are employed in the transportation of freight and passengers. They also own different lines of railway in Oregon and adjoining Territories, which are also employed in the transportation of freight and passengers. The business of the plaintiff is that of a carrier of parcels by the most rapid means of conveyance in use on its routes, under the direct supervision of agents accompanying them from the domicile or office of the owner, or shipper,

and delivering them at the office or domicile of the party to whom they belong or are consigned. The special advantage of the carrying business thus conducted, consists in this personal supervision over the articles by the agents of the express company during their transportation, from their receipt to their delivery at their destination, thus giving greater security against loss and accident. Railroad companies and other common carriers usually confine their supervision to securing safe carriage from one to another of their stations, depots or wharves. Their responsibility is limited, in the absence of special contract, to safe carriage over their own routes between such places, and, when transporting with connecting lines, to safe delivery to the next connecting carrier. The express company, in exercising personal supervision over articles intrusted to it from their receipt until their delivery to their destination, performs a most important and valuable service to the public. Its business, though comparatively of recent origin, has been conducted in the States and Territories of the country with such general care and fidelity by companies organized like the plaintiff, that they have become a favorite means of transporting small articles, and particularly those containing great value, or requiring special care in handling. The express business has thus become a recognized branch of the carrying trade, and the question is: Shall the railway companies and steamship companies engaged in that trade, be required to furnish facilities to the express companies in the transaction of this business? The business would entirely fail and come to an end if certain facilities for its transaction were not afforded them, such as allowing to them special cars, or apartments, or definite spaces in them for the transportation of such articles, with a messenger in charge thereof, having sufficient room for the assortment of the articles by him while in transit, so as to facilitate their delivery at the different stations to which they may be destined. It may be difficult to define with accuracy what should be deemed proper facilities in each case. That will depend very much upon the extent of the business and character of the articles carried by the express companies. In the present cases, it is not necessary to designate what those facilities should be. The object of the two suits is to restrain the defendants from denying to the plaintiff the facilities which have heretofore been furnished to it.

The question presented for determination is: Can one common carrier be required to furnish accommodations for the business of another common carrier, and, if so, to what extent? The question is one of much difficulty, and its correct solution will be far-reaching in its consequences. It has been before different circuit courts of the United States in some cases, but has never been brought before the supreme court. In the case of the Southern Express Co. v. St. Louis, etc., R. Co., in the eighth circuit, it was consid-

ered by Mr. Justice Miller, of that court, sitting with Judge McCrary in holding the circuit court. The railroad company in that case was enjoined by them from refusing or withholding the usual express facilities from the plaintiff. In giving his conclusions, Mr. Justice Miller, among other things, held, that the express business is a branch of the carrying trade, which, by the necessities of commerce and the usages of persons engaged in transportation, has become known and recognized so as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; that the object of this express business is to carry small and valuable packages rapidly in such manner as not to subject them to the danger of loss and damage, which to a greater or less degree attend the transportation of heavy or bulky articles of commerce; that it is one of the necessities of this business that the packages should be in the immediate charge of an agent or messenger of the company, or parties engaged in it, without any right on the part of the railway company to open and inspect them; that it is the duty of every railroad company to provide such conveyance, by special car or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads; that the use of these facilities should be extended on equal terms to all who are actually engaged in the express business, at fair and reasonable rates of compensation, to be determined by the court when the parties cannot agree thereon; and that a court of equity has authority to compel the railroad companies to carry this express matter and to perform the duties in that respect.

The same question has been decided substantially in the same way in other cases.

From the decisions rendered in some of them, appeals have been taken to the supreme court, and the cases are now on its calendar. Under these circumstances I have come to the conclusion to follow the view expressed in them rather than go into an extended consideration of the question. The following cases are now pending in the supreme court:

The Memphis & Little Rock R. R. Co. v. The Southern Express Co.; St. Louis, Iron Mountain & Southern R. R. Co. v. The Southern Express Co., and the Missouri, Kansas & Texas R. R. Co. v. Dinsmore, President of Adams' Express Co. In their determination the question presented will be definitely and authoritatively settled.

As a matter of form, therefore, I shall yield to the conclusions of the circuit court of the eighth circuit, which are in conformity with those expressed by Judge Dedy on the application for injunction in these cases, and will order a decree for the plaintiff in both. The defendants will thus be enabled to take an appeal

at once to the supreme court, and have their cases argued in connection with those now pending on the calendar of that court.

Let a decree be entered in both cases for the plaintiff, adjudging that it has a right to have express facilities furnished by the defendants, as heretofore, and continuing the injunction granted.

See next case and note.

WELLS, FARGO & Co.

v.

OREGON RY. AND NAVIGATION Co.

(*Advance Case, U. S. Circuit Court, D. Oregon. December 24, 1883.*)

The defendant was enjoined by this court to continue to furnish the plaintiff such express facilities on its road as it had been furnishing under an agreement between the parties, one provision of which is to the effect that the defendant will carry for the plaintiff not exceeding 8000 pounds of "freight and express matter" over its road daily on a fast train for the sum of \$1000 per month, but the plaintiff must not deliver any such "freight" or "matter" at less than a stipulated price per pound. Thereafter the defendant commenced to furnish express facilities to the Northern Pacific Express Co. upon the same terms and conditions, as it alleges, that it furnished them to the plaintiff, but allowed said Northern Pacific Express to deliver freight at a lower rate than the plaintiff was permitted to do, and thereupon the latter commenced to deliver freight for the same rates as said Northern Pacific, whereupon the defendant, conceiving itself aggrieved thereby, moved the court to modify the injunction so as to prevent the plaintiff from carrying any freight or express matter at the reduced rates, or to permit the defendant to increase the compensation to be paid it by the plaintiff so as to prevent the same. *Held* (1) that the defendant has no right to discriminate between the express companies, but must furnish equal facilities to both; (2) that although the plaintiff is in effect required by the decree to deliver this 8000 pounds of matter, or any portion of it, at not less than the prescribed rate, still, if the defendant permits the Northern Pacific to deliver any portion of the like 8000 pounds carried for it at less than such rates, this is necessarily a permission to the plaintiff to do the same; (3) *Semble*, that it is the duty of the defendant to use reasonable diligence to ascertain if either company is violating the condition upon which the facilities were granted to it, to the prejudice of the other, and, if so, to exclude it from the same; and certainly, where the failure to keep such condition is brought to its knowledge by the injured company or otherwise, unless it does interfere effectively, it will be presumed, in favor of the latter, to have waived such condition as to both.

Ferriage on the railway ferry of the defendant, if not absolutely an express facility, to which the plaintiff is entitled, becomes so when furnished to the Northern Pacific by the defendant.

MOTION to Modify Injunction.

Cyrus A. Dolph and Rufus Mallory for defendant.

M. W. Fechheimer for plaintiff.

DEADY, J.—On December 11, 1882, the defendant was enjoined and required by a decree of this court, given in this case, to furnish the plaintiff the express facilities on and over its lines of railway that it was then and had been doing, and upon the same terms. On November 16, 1883, the defendant filed a motion for the modification of said decree on the petition of the Oregon & Transcontinental Co., verified by the affidavit of the manager of said railway, Mr. R. Koehler, from which it appears that said company is a corporation formed under the laws of Oregon, and that since the date of said decree it has become the lessee of the defendant's lines of railway and acquired all its "rights and interests" in and to "the transportation business thereof," and particularly under a certain contract made between the plaintiff and defendant on October 14, 1876, concerning the transportation of express matter by the latter for the former, by which the cost of said transportation and the rates to be charged the public by the plaintiff were fixed, which contract was still in force at the date of said decree; that the plaintiff is now "wrongfully and fraudulently taking advantage of said injunction," and has reduced its rate of charges for "carrying the matter confided to it" over the defendant's road below that fixed by said contract, and below the "regular charges" of the lessee for transporting ordinary freight over the same, thereby increasing the business done by the plaintiff, to the injury of the "general freight-ing business" of the lessee; that the plaintiff is transporting over said road as "express matter" large quantities of merchandise not properly belonging to the business of carriers by express, for no other reason than that the charges are less than the regular charges for freight. The petition concludes with a prayer for the modification of the injunction, so "as to compel the plaintiff to limit its business to a proper and legitimate express business," and to charge such rates for the carriage of goods as are provided in said contract; and to enable the defendant, "by fair and proper charges, to protect itself from injury by the wrongful acts of the plaintiff."

On November 23d the plaintiff filed an answer to the petition, verified by the affidavit of its superintendant, Mr. Dudley Evans, by which it first denies in detail, but generally with a negative pregnant, all the allegations of the petition, and then admits and alleges that on October 14, 1876, it made a contract with the defendant for the transportation of its express matter over the railway of the defendant, as shown by a copy thereof annexed to said answer, from which among other things, it appears that the plaintiff, in consideration of the payment by it to the defendant of \$1000 per month, was entitled to carry in a car set apart for its use, on each passenger train, 8000 pounds of "express matter and freight," for which it was to charge on all lots of less than 100 pounds "not less than double first-class railway freights," and for lots of greater weight

not less than one and a half times such rates, or the rates specified in a schedule therein, for all the stations between the then termini of the road,—Portland and Roseburg,—and in case “the freight” offered by the plaintiff for carriage should exceed 8000 pounds in weight, the defendant was bound to carry the same, and the plaintiff to pay therefor at the rate of one and a half the first-class rates then charged by the defendant. The contract also contains provisions to the following effect: (1) That neither the defendant nor its employees shall carry express matter on a passenger train; (2) that the defendant will not, as I construe the ambiguous language of the provision, contract with any other express company or association for “better facilities than are granted” to the plaintiff; and (3) that the contract shall go into effect on November 1, 1876, and continue in force for one year, and from year to year thereafter, unless notice is given by one or both parties, at least one month previous to the end of the contract year, of a withdrawal therefrom. The answer also alleges that the Northern Pacific Express Co. is a corporation largely owned and controlled by the same persons who control the defendant corporation and the Oregon & Transcontinental Co. that for the past three or four months said express company has been and still is doing an express business on the defendant’s railway, and that it is afforded thereon more and better facilities at cheaper rates than the plaintiff; that said express company is permitted to carry “freight and express matter” at rates much less than the regular railway rates, and that it has threatened and still threatens to carry “freight and express matter” for ten cents per 100 pounds less than the plaintiff may charge for the same service; and that said Oregon & Transcontinental and express companies are by such means attempting to injure and destroy the business of the plaintiff. The answer also contains an allegation to the effect that the plaintiff has never carried on any one train over 8000 pounds of matter, nor on an average over 3000 pounds. On the same day the defendant filed a reply, verified by the affidavit of said manager, to the effect that by the agreement with the Northern Pacific Express Co. it is to have the same facilities and upon the same terms as the plaintiff, and not otherwise, and that if said express company has carried “freight and express matter” over the road at less than the prescribed rates, it has been done without such manager’s knowledge or consent, and in violation of the terms of the contract.

On the argument it was conceded that the Oregon & Transcontinental Co., not being a party to this suit, could not be directly heard in this matter, but although no direct attempt was made to prove that it had become the lessee of the road as alleged, yet the fact was tacitly admitted. On the hearing the plaintiff read five affidavits, including one of its superintendent, from the latter

of which it appears that the plaintiff is carrying and intends to carry freight and express matter at as low rates as the Northern Pacific Express Co., but not lower; and that within one week before the filing of this motion, he informed the manager of the defendant's road that said express company was carrying freight at 30 per centum below first-class railway rates. From the other of these affidavits, none of which are contradicted in any particular, it satisfactorily appears that the Northern Pacific Express is carrying between Roseburg, Oakland, and Eugene and Portland, for at least 50 per centum less, on an average, than the rates specified in the contract of October 14, 1876. And upon the whole case it appears that the plaintiff intends, and is endeavoring, to carry at as low rates as the Northern Pacific for the purpose of preserving its business, and not otherwise.

Before proceeding to the consideration of the particular question arising upon this motion, it may be well to glance at the origin of the controversy. This suit was commenced on December 11, 1882, when an order was made that the defendant show cause why it should not be enjoined as prayed in the bill, and that in the mean time it be so restrained. On March 19, 1883, after full argument, a preliminary injunction was allowed. 8 Sawy. 600. This injunction is still in force, the case having since been heard on a demurrer to the bill, which was overruled by Mr. Justice Field. See ante. It also appears that before the commencement of the suit that the defendant gave the plaintiff notice that it could not have any express facilities on its road after that year, as it intended to do the express business itself. And, first, my impression is that the contract of October 14, 1876, is no longer in force, *proprio vigore*, between the parties. "One or both parties," meaning, I suppose, either party, could terminate and annul the contract at the end of any year, by giving notice of its intention to withdraw from it, and, as the defendant appears to have given such notice, it follows that the compact, as such, is at an end. The relations between the plaintiff and defendant, and their reciprocal obligations, are now prescribed and measured by the decree of this court. In making this decree it adopted for the time being, as a convenient and just definition and enumeration of proper express facilities, and the terms and conditions upon which they should be furnished, the state of things or relations and obligations then existing between the parties. And this, of course, had the effect to prolong the provisions of this contract applicable to the subject-matter, under which the parties had been acting for six years, and continue them in force as a part of the decree of the court. And, second, in canvassing the motives and acts of the parties, it must be borne in mind that the defendant desired and intended to withdraw all express facilities from the plaintiff for the purpose of taking the business exclusively into its own

hands, and that although it was prevented from excluding the plaintiff from its road and has not directly undertaken to conduct the business itself, yet it is furnishing facilities to a company that is necessarily a rival of the defendants, and appears to be closely allied, if not identical in interest, with itself.

Upon the case made there does not appear to be any ground for the complaint that the defendant is carrying more matter or of a different character from that it is entitled to; while it does appear from admission of counsel that the defendant is carrying the Northern Pacific wagons on its railway ferry across the Willamette river at this place free of charge, while it compels the plaintiff to pay for a like service at the regular rates. Whether this ferriage is an absolute express facility may be a question, but I am quite sure that if the defendant furnishes it to the Northern Pacific free of charge, it must do the same for the plaintiff. It cannot discriminate against either, but must treat both alike.

In the nature of things, there can be no absolute and prescribed definition of "express matter." Like the phrase "express facilities," its scope and meaning may be modified by circumstances. And so long as the express company pays the railway company an agreed sum for so much space in a car, or weight carried therein, or one and a half times first-class railway rates for whatever it carries over its road, there is no need of any definition. It defines itself, and includes everything that the express company can get or afford to carry on those terms. And if it carries all the freight and express matter that goes over the road, it works no injury to the defendant, but a benefit.

Under the arrangement between the plaintiff and defendant, the former is entitled to carry 8000 pounds of either "freight" or "express matter," if there is any difference between them, once a day each way, over the road of the latter upon the payment of \$1000 a month, and as much more as it may desire upon the payment therefor at the rate of one and a half first-class railway rates. But, so far at least as the 8000 pounds is concerned, the plaintiff is bound to charge the public the enhanced rates prescribed in the agreement. This condition was intended for the benefit of the defendant, and the observance of it might work to its advantage in this way: If 8000 pounds of freight is offered on a given occasion, and only 1000 of it would bear carriage at express rates, the defendant would carry the other 7000 pounds at railway rates, upon a slow train, and get the same compensation from the express company as if the latter had carried the whole of it. But as to the freight carried by the plaintiff in excess of 8000 pounds, and for which it must pay, not a lump sum, but one and a half times first-class railway rates, it can make no difference to the defendant how light are the charges of the plaintiff, nor how much freight it may carry. But the plaintiff, in carrying any portion of

the 8000 pounds for less than the stipulated rates, is violating the contract or terms upon which it is entitled to the facilities it enjoys, unless the defendant by its conduct has waived this condition of the contract, or furnished the plaintiff with an excuse or justification for not keeping it.

By the law of this case, until otherwise established by the supreme court, the defendant is bound to furnish the express company with reasonable facilities for the conduct of its business, and if there is more than one company doing business over its road it must furnish equal facilities to all. To deal fairly and justly in this respect, and according to its obligation, the defendant must serve the express companies equally, and neither directly nor indirectly favor one or hinder the other. Whatever terms or favors it extends to one it must extend to the other, because the other becomes thereby entitled to them. No discrimination can be allowed, but equality of service, conditions, and compensation is the fundamental rule governing the business or transaction.

But, says the counsel for the defendant, we have made the same terms with these express companies and if the Northern Pacific is delivering freight at less than the stipulated rates, we are not aware of it, and if we were, we are not responsible to the plaintiff for it. If the plaintiff is injured by the conduct of the Northern Pacific in this respect, it must seek a remedy against that company. A grosser misconception of the relations and rights of these parties could hardly have been expressed in so few words. These express companies are strangers to each other. They are each dealing with the defendant, and their relations are with it and not one another. Whatever facilities or favors the defendant extends or permits to one, it must extend or permit, upon the same terms, to the other. It is therefore bound, I think, to exercise reasonable diligence to ascertain whether either of them is violating the contract on condition under or on which it is doing business on the road to the prejudice of the other,—as by delivering freight at less than the stipulated or prescribed rates,—and if so, to take the proper measures to prevent a continuance or repetition of such conduct. Certainly, if it is brought to the knowledge of the defendant that the Northern Pacific is cutting rates, it would be its duty to exclude the latter from its road, unless it intends to permit the plaintiff to do the same thing. And in such cases if it takes no steps to prevent the Northern Pacific from carrying for less than the established rates, the inference must be that the defendant permits it to do so, and therefore it ought not to be heard to object if the plaintiff does the same. And if the defendant was ignorant of the conduct of the Northern Pacific, because it was willfully blind to it, or did not care to know the fact, the same consequence would follow.

The defendant has ascertained that the plaintiff is delivering

freight below the stipulated rates, and doubtless might as easily and readily have found that in so doing it was merely following of necessity the example of the Northern Pacific. Indeed, the attention of the manager of the defendant was directly called to the fact that this company was cutting rates, by the superintendent of the plaintiff, before this proceeding was commenced. But nothing was done about it, and the defendant seems to have acted upon the theory that it could evade the injunction by permitting a company, which is either in fact itself or its close ally in interest, to carry for one half the rates the plaintiff is required to charge, and thereby destroy the latter's business and drive it off the road. But the law is not so vain a thing as this, and it will look below the surface of such a subterfuge and protect the plaintiff in the right to compete for business over the road within the limits which the defendant allows or permits to the Northern Pacific. The defendant is not entitled on the case made to any modification of the injunction or interference of the court.

This conclusion is fully sustained by the rulings in the following cases: *Dinsmore v. Louisville, etc., Ry. Co. and Southern Exp. Co. v. Nashville, etc., Ry. Co.*, 2 Fed. Rep. 465; *Southern Exp. Co. v. Louisville, etc., Co.*, 4 Fed. Rep. 481; *Texas Exp. Co. v. Texas, etc., Ry. Co.*, and *Same v. International, etc., Ry. Co.*, 6 Fed. Rep. 427; *Southern Exp. Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799.

The motion is disallowed, at the costs of the defendant.

Express Companies.—The business done by express companies constitutes so important a factor in the commercial dealings of modern times, that a number of cases have arisen as regards the conflicting rights of these corporations and railroad companies. The railroads have been somewhat disposed to curtail or abridge the facilities afforded to express companies when they have threatened to become serious rivals in the carrying trade. The disposition of the courts has constantly been, however, in favor of the express companies, on the broad general ground that their business is of the utmost importance to the public at large.

English Cases.—A number of cases upon this very question have arisen in England, the results of which may thus be succinctly stated.

(1). A railroad company cannot exclude or discriminate against an express company either in favor of another express company or of itself.

(2). A railroad company is bound to furnish to an express company all reasonable facilities for the transaction of its business.

(3). A railroad company is bound to charge an express company reasonable fixed sums for the transportation of bundles or boxes of given size or weight. It cannot demand a separate freight for each parcel contained in such bags or boxes.

The following are the principal authorities: *Pickford v. Grand Junction R. Co.*, 10 M. & W. 899; *Parker v. Great Western R. Co.*, 7 M. & G. 252; *Edwards v. Great Western R. Co.*, 11 C. B. 588; *Crouch v. London & N. W. R. Co.*, 25 Eng. L. & Eq. 287; *Crouch v. Great Northern R. Co.*, 9 Exch. 556; *Same v. Same*, 11 Exch. 740; *Marriott v. London & S. W. R. Co.*, 1 C. B. (N. S.) 498; *Baxendale v. North Devon R. Co.*, 8 C. B. (N. S.) 824; *Pid-*

dington v. South Eastern R. Co., 5 C. B. (N. S.) 11; Baxendale v. Great Western R. Co., 5 C. B. (N. S.) 809; Same v. Same, Id. 386; Gaston v. Bristol & Exeter R. Co., 6 C. B. (N. S.) 639; s. c., 7 Jur. (N. S.) 178; Same v. Same, 1 B. & S. 112; Baxendale v. Bristol & Exeter R. Co., 11 C. B. (N. S.) 787; Baxendale v. London & S. W. R. Co., 12 C. B. (N. S.) 757; Baxendale v. Great Western R. Co., 14 C. B. (N. S.) 1; s. c., 16 Id. 137; Sutton v. Great Western R. Co., 8 H. & C. 800; s. c., 4 H. of L. 226; Parkinson v. Great Western R. Co., L. R. 6 C. P. 554, Palmer v. London B. & S. C. R. Co., L. R. 6 C. P. 194.

Facilities to be Afforded to Express Companies.—It was held in a Massachusetts case decided some years since, that a railroad company is not bound to furnish to express companies facilities greater or different in kind from those furnished to the public at large, and this, although the custom of the company might be to the contrary. *Sargent v. Boston & Lowell R. Corp.*, 115 Mass. 416, and see *Camblos v. P. & R. R. Co.*, 4 Brewst. 463.

This is, however, clearly no longer the law. Railroad companies are bound to furnish to express companies all the requisite facilities for carrying on their peculiar business and must permit express messengers to accompany the goods transported by the express company, in the usual manner. *Dinsmore v. Louisville, C. & N. R. Co.*, 2 Fed. Rep. 465; *Southern Express Co. v. L. & N. R. R. Co.*, 4 Fed. Rep. 481; *Express Cos. Cases*, 8 Am. & Eng. R. R. Cas. 594; *Southern Express Co. v. Nashville, C. & St. L. R. Co.*, 20 Am. L. Reg. 590; *Wells, Fargo & Co. v. Oregon R. & N. Co.*, supra.

Whether Railroad Company can Engage in Express Business.—The earlier cases are to the effect that a railroad company may lawfully carry on the express business itself as it is not ultra vires. *Camblos v. Phila. & R. R. Co.*, 4 Brewst. 563; s. c., 9 Phila. 411; *Sargent v. Boston & Lowell R. Co.*, 115 Mass. 416.

The later authorities are, however, to the effect that it cannot lawfully engage in such business. *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799; *Dinsmore v. Louisville, C. & L. R. Co.*, 2 Fed. Rep. 465; *Southern Express Co. v. Nashville, C. & St. L. R. Co.*, 20 Am. L. Reg. 590.

The question has never been raised directly. It has, however, been definitively settled that railroad companies cannot if they themselves undertake the express business give themselves exclusive or preferential advantages. *Camblos v. Phila. & R. R. Co.*, 4 Brewst. 563; s. c., 9 Phila. 411; *Southern Express Co. v. Louisville & N. R. R. Co.*, 4 Fed. Rep. 481.

Discrimination.—A railroad company cannot discriminate between one express company and another so as to give to one exclusive or preferential privileges or advantages denied to the other. *Sanford v. Railroad Co.*, 24 Pa. St. 378; *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188; s. c., 5 Am. Law Reg. (N. S.) 728; *McDuffee v. Portland & Rochester R. Co.*, 52 N. H. 430; *Dinsmore v. Louisville, C. & N. R. Co.*, 2 Fed. Rep. 465; *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799; *Southern Express Co. v. Nashville, C. & St. L. R. Co.*, 20 Am. L. Reg. 590; *Texas Express Co. v. Texas & Pacific R. Co.*, 6 Fed. Rep. 426; *Wells, Fargo & Co. v. Oregon R. & N. Co.*, supra.

One express company cannot be charged higher rates than another. *Southern Express Co. v. Memphis, etc., R. Co.*, 8 Fed. Rep. 799. Nor can a contract be entered into to furnish every day to one company such an excessive and unnecessary amount of space as will disable the railroad authorities from supplying proper facilities and accommodations for other companies. *Texas Express Co. v. Texas & Pacific R. R. Co.*, 6 Fed. Rep. 426.

Opening Packages.—It is well known that express companies usually transport the small packages committed to their charge in large boxes or bundles. The question has sometimes arisen whether a railroad company can lawfully demand that such packages be opened in order that its officials

may inspect the contents and charge for each package separately. The question was at first an open one. *Camblos v. Phila. & R. R. Co.*, 9 Phila. 411.

But the current of opinion is now to the effect that the railroad authorities can make no such demand but must charge their freight on the closed chests or bundles. *Dinsmore v. Louisville, N. A. & C. R. Co.*, 2 Fed. Rep. 593; *Express Cos. Cases*, 3 Am. & Eng. R. R. Cas. 594. It is at any rate clear that such is the law where the railroad company is itself carrying on a competing express business. *Southern Express Co. v. Louisville & N. R. Co.*, 4 Fed. Rep. 481.

Charges and Compensation.—A railroad company must charge an express company reasonable rates for transportation. In the event of a dispute as to rates the court will fix the compensation from time to time after the services are rendered, but will not fix rates in advance. *Express Cos. Cases*, 3 Am. & Eng. R. R. Cas. 594. Where there has been an existing contract prior to the litigation the rates thereby provided will be presumed to be reasonable and just. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, *supra*. If there has been no such past contract, the court will fix the compensation from time to time as the business progresses. *Express Cos. Cases*, 3 Am. & Eng. R. R. Cas. 594. A decree of court fixing a reasonable rate is final and appealable in its nature. *St. Louis, etc., R. Co. v. Southern Express Co.*, *infra*.

Statutory and constitutional provisions fixing maximum rates of freight and fare which may be charged by railroad companies, have no reference to the transportation of express matter and messengers. *Texas Express Co. v. Texas & Pacific R. Co.*, 6 Fed. Rep. 426; *Express Cos. Cases*, 3 Am. & Eng. R. R. Cas. 594.

ST. LOUIS, I. M. AND S. RY. CO.

v.

SOUTHERN EXPRESS CO.

(Advance Case, Supreme Court of the U. S. January 29, 1883.)

A decree is final for the purposes of an appeal when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.

In a suit brought by an express company against a railway company, the controversy being about the right of the express company to require the railway company to do the express company's business on the payment of lawful charges, where the decree in effect requires the railway company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable, *held*, a final decree and appealable, notwithstanding a supplemental order relating to settlement of accounts was made after entry of the decree.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri. On motion to dismiss.

Jas. O. Broadhead, John F. Dillon, and Wager Swayne for appellant.

S. F. Glover, John R. Shepley, S. M. Breckinridge, and Clarence A. Seward for appellee.

96 ST. LOUIS, I. M. AND S. RY. CO. v. SOUTHERN EXP. CO.

WAITE, C. J.—The Southern Express Co., an express carrier, filed its bill in equity against the St. Louis, Iron Mountain & Southern Ry. Co., in the circuit court for the eastern district of Missouri, to enjoin the railway company from interfering with or disturbing the express company in the enjoyment of the facilities it then had for the transaction of its express business over the railway company's railroad, so long as the express company conformed to the regulations of the railway company and paid all lawful charges for the business. A preliminary injunction was asked for, and, in this connection, the bill prayed that if any dispute or disagreement should arise between the parties during the pendency of the suit, upon the question of compensation to be paid for transportation, the express company might be permitted to bring the same before the court for decision by way of an interlocutory application. On the filing of the bill the preliminary injunction was granted, which was afterwards modified in some particulars affecting the compensation to be paid and the mode of doing the business.

On the twenty-fifth of March, 1882, the court entered a decree containing the following provisions:

"(5) That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control."

"(10) Whereas, it is alleged by complainant that since the commencement of this suit, and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon."

"(11) That the defendant, its officers, agents, servants, and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express

matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depot, trains, cars, or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding 50 per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party a right, at any time hereafter, to apply to this court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

“It is further ordered, adjudged, and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee-bill issue therefor.”

On the twenty-ninth of March the railway company prayed an appeal, which was allowed, and, on the fifteenth of May, perfected by the approval of the necessary bond. During the same term of the court, but after the appeal bond was accepted and approved, the express company moved the court to grant it the benefit of a reference authorized by sections 5 and 10 of the decree, and a master was appointed to inquire into and report on the matters alleged.

The cause having been duly docketed here, the express company moves to dismiss the appeal, on the ground that the decree appealed from is not a final decree.

As we have had occasion to say at the present term, in *Bostwick v. Brinkerhoff*, 1 Sup. Ct. Rep. 15, and *Grant v. Phoenix Ins. Co.*, Id. 414, a decree is final, for the purposes of an appeal to this court, when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. Under this rule we think the present decree is final. The suit was brought to compel the railway company to do the express company's business. The controversy was about the right of the express company to require this to be done on the payment of lawful charges. It was no part of the object of the suit to have it definitely settled what these charges should be for all time. The point was to establish the liability of the railway company to carry. The decree requires the carriage, and fixes the compensation to be paid. It adjudges

costs against the railway company, and awards execution. Nothing more remains to be done by the court to dispose of the case. Inasmuch as the rates properly chargeable for transportation vary according to the circumstances, and what was reasonable when the decree was rendered may not always continue to be so, leave is given the parties to apply for a modification of what has been ordered in that particular, if they, or either of them, shall desire to do so. In effect, the decree requires the railway company to carry for reasonable rates, and fixes for the time being the maximum of what will be reasonable.

The controversy which the express company has had referred to the master, about the compensation to be paid for the transportation during the pendency of the suit, does not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order are of the same general character as those of a receiver who holds property awaiting the final disposition of a suit. They are incidents of the main litigation, but not necessarily a part of it. The supplemental order, made after the decree, relates only to the settlement of the accounts which accrued pending the suit.

The motion to dismiss is denied.

See Wells, Fargo & Co. v. Oregon R. & N. Co., and note, *supra*.

MISSOURI PACIFIC RY. CO.

v.

DOUGLASS & SONS.

(*Advance Case, Texas. October 30, 1883.*)

A description of the defendant as the Missouri Pacific R. Co., giving the name of the President of the company does not raise the presumption that the company is incorporated, and is an insufficient description when specially excepted to.

In a suit against a carrier to recover value of cotton lost, to authorize a recovery. *Held*, that it must be proved: 1. That defendant was a common carrier. 2. That the cotton was received as freight by defendant, in such manner as to constitute defendant a common carrier of the cotton. 3. Failure to transport the cotton to the place of destination.

The petition alleged that the cotton was delivered to defendant on its platform, it being the custom of defendant, at that place, to receive freight for shipment on its platform, and that, relying upon this custom, the plaintiff so delivered the cotton without demanding or receiving a receipt or bill of lading therefor. *Held*, that the petition was bad.

Articles 277 to 283 Revised Statutes cited and construed, and the conclusion deduced that the liability of a common carrier for freight does not attach until a receipt, or a bill of lading for the same, has been given by the carrier.

A custom cannot have the effect to change or to modify the plain provisions of a statute.

If the company has a depot, or warehouse, for storing goods, it is responsible for all goods in its care, as warehouseman, until the commencement of the trip, or voyage; and the trip, or voyage, is not to be considered as having commenced until the signing of the bill of lading.

If the bill of lading is demanded and refused the party injured has his remedy in a penalty of not less than \$5 nor more than \$500.

APPEAL from Cherokee County.

D. C. Bolinger for appellant.

M. Priest for appellees.

HURT, J.—J. P. Douglass & Sons sued the Missouri Pacific Ry. Co. for \$500 damages, the value of six bales of cotton, charged to have been delivered to the company as common carriers, and recovered \$304.70.

The petition alleges that appellant was a company, but nowhere mentions the individuals who compose the company, except the President, J. Gould. To the petition the company excepted, the second exception being that it "does not describe defendant as such person, or body corporate, as may be sued in such manner as is here attempted." The court below overruled defendant's exceptions. Was this error? We think so. A description of the defendant as the Missouri Pacific Ry. Co., giving the name of the President, does not raise the presumption that it was an incorporated company. The jurisdiction of the County Court obtains by virtue of the fact that the defendant is a resident of the county of the suit, or by reason of the exceptions named in Article 1198, Revised Statutes, or as a corporation. *Ward v. Lathrop*, 4 Tex. 180; *Briggs v. McCullough*, 36 Cal. 542; *Life Insurance Co. v. Davidge*, 51 Tex. 244.

The very grievance of this suit is that defendant is a common carrier, and as such received the cotton for transportation, and failed to deliver the same at its place of destination. Where a recovery is sought upon these grounds the primary facts must be proved:

1. That defendant was a common carrier.
2. That the cotton was received as freight by defendant in such manner as to constitute defendant a common carrier of the cotton.
3. Failure to transport the cotton to the place of destination.

That defendant was a common carrier there was no question. This was not denied. The company excepted to the sufficiency of the petition upon the ground that the facts therein alleged not only failed to show that the cotton was received by defendant in such manner as that the relation of common carrier attached thereto, but that the alleged facts most clearly negative that the cotton was thus received. The allegations of the petition upon

this subject are substantially these: That this cotton was delivered to the company on its platform, it being the custom of said company at that point (Jacksonville) to receive freight for shipment on its platform; that this was the custom and manner of dealing with the public, said company thus holding itself out to the world as a common carrier, ready and willing to thus transport freight. And that, relying upon said custom, and by reason of the same, the plaintiff delivered the cotton on the defendant's platform without demanding or receiving a receipt or bill of lading for the same.

The cotton having been consumed by fire on the platform the question here presented for decision (there being no receipt or bill of lading) is, whether the liability of a common carrier had attached to the cotton? A proper solution of the question requires a construction of our statute upon the subject.

Article 277 provides, under the title "carriers," that "the duties and liabilities of carriers in this State shall be the same as are prescribed by the common law, and the remedies against them shall be the same, except where otherwise provided by this title."

Evidently it was intended by the provisions under this title to prescribe, regulate and charge the duties and liabilities of carriers. Hence the passage of the articles following the one last cited, viz.: Articles 278, 279, 280, 281 and 283.

The cotton not having been placed on board of the cars, but delivered on the platform, what was required under this act to create the relation of common carrier in regard to the cotton? What says the statute? The proviso of Article 283, to our minds is very plain. It is as follows: "Provided that the trip, or voyage, shall be considered as having commenced from the time of signing of the bill of lading, and the liability of common carrier shall attach, as at common law, from and after such signing."

The converse of the proposition is unquestionably true; that is, that the liability of the common carrier, as at common law, shall not attach before the signing of the bill of lading. Nor shall the voyage be considered as having commenced until the signing of said bill.

If the company has a depot, or warehouse, for storing goods, it is responsible for all goods in its care, as warehousemen, as at common law, until the commencement of the trip or voyage, but shall not be liable as common carrier until the commencement of the trip or voyage. Art. 281. And by this article, and Article 283, we find that the trip, or voyage, does not commence until the signing of the bill of lading. It follows most evidently, that as regards goods in its care, the company is liable before the voyage, if at all, as warehousemen, and cannot be held liable as common carrier without a bill of lading.

If a bill of lading is demanded and refused the party injured has

his remedy in a penalty of not less than \$5 nor more than \$500. Article 280.

These provisions, we believe, were enacted to place beyond doubt the often very troublesome question as to when the liability of common carriers attach.

But it is alleged by the appellee that the custom of the company at that point (Jacksonville) to receive on its platform and ship cotton, without giving a bill of lading, should have the effect to take this case out of the operation of the statute (citing *Pierce on American Railroad Law*, 426, and *Judge Storrs' Observations in a Note*). This presents the question as to whether a custom can change or modify the plain provisions of the statute. We are of the opinion that it cannot.

Concede, however, that a custom could be pleaded in excuse for a failure to obtain a receipt, or bill of lading; still, in this case there is no evidence tending to prove that defendant had ever received on its platform and shipped cotton without giving a bill of lading therefor. The extent to which the proof goes in this case is, that cotton had frequently been left on the platform of defendant, taking the bill of lading on the next day, or at some subsequent time. Such proof falls far short of establishing such custom as would hold defendant liable as a common carrier.

But, if we are right in our construction of the statute upon this subject, it follows that the petition is fatally defective, seeking, as it does, to hold the company liable as a common carrier. We are, therefore, of the opinion that the court erred in overruling defendant's exceptions to the petition. We will not discuss the other errors assigned because we believe they will not arise again by reason of the principles above enunciated. Because the petition is fatally defective in the two respects above pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

Delivery of Goods to Carrier.—A carrier becomes liable as such from the time that he actually takes possession of goods for transportation. *Merritt v. Old Colony R. Co.*, 11 Allen, 80; *Illinois R. Co. v. Smyser*, 38 Ill. 354; *McHenry v. Railroad Co.*, 4 Harring. (Del.) 448; *Hart v. Baxendale*, 6 Exch. 769; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. R. Cas. 256; *Marquette, etc., R. R. Co. v. Kirkwood*, 9 Am. & Eng. R. R. Cas. 85.

Where the goods have not been received with express orders for transportation or wherever there is some act remaining to be done by the consignor before the goods are forwarded, a railroad company receiving and retaining them is not liable as a carrier but as a warehouseman merely. *Barron v. Eldredge*, 100 Mass. 455; *St. Louis R. Co. v. Montgomery*, 39 Ill. 335; *Michigan R. Co. v. Schurtz*, 7 Mich. 515; *Watts v. Boston & Lowell R. Co.*, 106 Mass. 467; *Judson v. Western R. Co.*, 4 Allen, 520; *Nichols v. Smith*, 115 Mass. 332; *McDonald v. Western R. Co.*, 34 N. Y. 497. But see *Michaels v. New York R. Co.*, 30 N. Y. 564.

ADAMS EXPRESS CO.

v.

BOSKOWITZ et al.

(107 *Illinois Reports*, 660.)

In an action to recover for loss of goods against an express company where the defence was a fraudulent concealment of the value of the several packages, the plaintiffs' clerk who filled up the receipt the company signed, on cross-examination testified, that until about a year prior to the date of the shipment the plaintiffs had put a valuation on goods and paid an extra charge thereon, and that he struck out of the receipt the words "valued at," etc. The plaintiffs' counsel then asked the witness, "Why?" and he answered, because he was told by one of the plaintiffs not to give a valuation, and that plaintiff told him he had an understanding with the express companies and with the agent of the defendant company that he was to pay no more valuation charges: *Held*, that such declarations of one of the plaintiffs were clearly inadmissible, not having been made in the presence of the defendant, or constituting any part of the *res gestæ*.

In a suit against an express company to recover for the loss of three bales of furs shipped, the defendant's receipt therefor, when produced in evidence, had a memorandum thereon in a corner, showing the weight of each bale, and that two were mink and one skunk furs. The plaintiffs' clerk testified that this was put upon the receipt before it went to the express office for signature, and, on cross-examination, that the weights of such packages were kept in the receipt book, and that such weights were "most always" put in the receipt books. The agent of the express company who signed the receipt, testified that to the best of his knowledge that memorandum was not on that receipt when he signed it. He was then asked whether or not it was customary for the plaintiffs, according to his observation, to put their weights on their receipts. On objection the court disallowed the question. The witness had been in the service of the defendant for many years. *Held*, that the question should have been allowed, as competent to contradict the testimony of the plaintiffs' clerk.

A party, in forwarding goods by express, took a blank receipt of the United States Express Co., and wrote the word "Adams" over the words "United States," and inserted therein a description of the goods, leaving an exemption clause unchanged, so that it read, "the said United States Express Co. are not to be held liable," etc., which receipt was signed by the agent of the Adams Express Co., and delivered to the shipper: *Held*, that the United States Express Co. was in no sense a party to the contract or receipt, and that in a suit against the Adams Express Co. an instruction stating that the receipt contained on its face no agreement for an exemption from liability between the plaintiffs and defendant, and assuming that the exemption in the receipt was contained in the "contract with the United States Express Co.," was palpably misleading, and unwarranted."

A blank receipt of the United States Express Co. for goods to be forwarded, was changed by erasing the words "United States," and inserting over the same the word "Adams." and signed by the agent of the Adams Express Co., which company received the goods described in the receipt, but the clause in the receipt as to the limitation of the company's liability was left unchanged, so that it read, "the *United States Express Co.* are not to be held liable," etc.: *Held*, that the law, in the absence of

proof dehors the receipt, would not determine whether such limitation clause related to the Adams or the United States Express Co., and that the true intent of the parties giving or receiving such receipt must be determined from circumstances to be proved.

In an action against an express company to recover for the loss of three packages of furs, in which a fraudulent concealment of the value of the packages, was relied on in defence, the court, in substance, instructed the jury, that although the clause in the receipt exempting the company from any greater liability than \$50 for a package unless its value was truly given, may have been known to the plaintiffs, and that it was intended to apply to the packages shipped, and although the plaintiffs accepted the receipt with all this knowledge, and without objection thereto, and although the plaintiffs had agreed to pay a valuation charge on the character of goods embraced in the shipment, and omitted to state a valuation, all this would not be a fraud, and in the absence of fraud such omission would constitute no defence.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook county; the Hon. Joseph E. Gary, judge, presiding.

Appellees were dealers in furs. They had a business house in New York City and one in Chicago, and were in the habit of shipping furs by express from Chicago to New York. There were in Chicago three express companies,—the United States, the American, and the Adams,—each of which, as a common carrier, was in the habit of carrying furs from Chicago to New York, and appellees shipped furs by each of these lines. The regular rates of charges by each of these companies for carrying furs from Chicago to New York was, for coarse furs three dollars per hundred pounds, and for fine furs three dollars per hundred pounds, and one quarter of one per cent upon the value of the fine furs. It was the habit of appellees, when a shipment was made by either of these companies, to put up their packages at their store, and having marked the same properly, to fill up a receipt to be signed by the express company on the receipt of the goods, and returned, when so signed, to the shippers.

Appellees, in March, 1872, had in their possession and use books of printed blank forms for express receipts. Some of them contained blanks of the usual form of receipts given to shippers by the United States Express Co., and some of which contained like blanks of receipts usually given by the American Express Co. They do not seem to have had any such blanks running in the name of the Adams Express Co. These forms seem to have been used indiscriminately, whether the shipment was made by the United States Express, the American, or the Adams,—that is, in shipping by the United States Express the shipping clerk of appellees often used the form printed for the American, by simply writing the words "United States" over the word "American," at the head of the receipt; and in shipping by the American Express Co. he often used a blank prepared for the United

States Express Co., simply writing over the printed words "United States," at the head of the receipt, the word "American;" and in shipping by the Adams Express Co., appellees' clerk used either a blank printed for use with the United States, or a blank printed for use with the American, by simply writing the word "Adams" over the words "United States," or the word "American," at the head of the receipt, according to which form happened to be at hand. These receipts were not usually cut or torn from the book, when used, but were filled up by appellees in the book, and signed by the agent of the express company in the book, and the book containing the receipts which had been signed, and also blanks for further use, was returned to and kept by appellees. This, by the testimony of appellees' witnesses, was the usual course of the business.

On March 20, 1872, appellees sent from their house in Chicago three packages of furs to the Adams Express Co., to be shipped to New York City, and sent with them the receipt book containing receipts and blanks for receipts in forms printed for use with the United States Express Co., and in that book a receipt for these three packages, filled up in the name of the Adams Express Co. The goods were received by the Adams Express Co., and the receipt, as filled up by appellees, was signed in the book by Peterson, the shipping clerk of that company, and the book was returned to the appellees. The body of that receipt, so far as is material to this case, was as follows,—the words italicized were in writing, and the other words in print:

"ADAMS EXPRESS COMPANY,

"CHICAGO, *March 20, 1872.*

"Received of *J. & A. Boskowitz* three (3) bales, said to contain *Peltries*, valued at — dollars, and marked *J. & A. Boskowitz, No. 38 Mercer Street, New York*, which we undertake to forward to the nearest point of destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that the said United States Express Co. are not to be held liable for any loss or damage except as forwarders only, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is herein stated; nor for any loss or damage by fire. . . .

"For the proprietors.

Peterson, Agent."

The three bales were placed in the express car, in a passenger train on the railroad, which left Chicago on the evening of that day for New York City. The next morning, before day, at a point near Fort Wayne, Indiana, the train was thrown from the track by reason of a broken rail, and the cars at once took fire, and all save one were burned. The express car containing these bales of peltries, with all its contents, was burned. This is an action of

assumpsit brought by appellees, against appellant, to recover the value of these furs.

The action was begun in April, 1872. The appellant pleaded, denying its liability. On a trial in January, 1874, a verdict was rendered for the defendant, which, on motion, was set aside, and a new trial granted by the Superior Court of Cook county. The issues were again tried in November, 1874, when a verdict was again rendered for the defendant, and again that court granted to the plaintiffs a new trial. A third trial was had in May, 1875, in which a verdict for plaintiffs was rendered, and their damages fixed at \$50, and judgment went for that amount. Plaintiffs appealed from that judgment to this court, and upon a hearing here that judgment was reversed. (The case is reported 93 Ill. 523.) The cause was remanded, and in May, 1880, there was another trial, in which the jury failed to agree. In October, 1881, the issues were again tried, and a verdict rendered for plaintiffs, and damages assessed at \$12,768. Appellant moved for a new trial. Appellees thereupon entered a remittitur of \$4651.32, and the court refused a new trial, and rendered judgment against appellant for \$8117.45, and costs. This judgment, on appeal, was affirmed in the Appellate Court, and the case comes here on appeal from that judgment of the Appellate Court.

Messrs. Wm. H. and J. H. Moore for the appellant.

DICKEY, J.—On the trial of the issues in this cause the defendant relied upon a supposed contract on the part of plaintiffs, springing from the fact that plaintiffs had accepted a receipt, in which it was provided that in want of a statement of value in the receipt the liability of defendant should not exceed \$50 for each bale or package, and upon circumstances and testimony tending to show that this provision in the receipt was known to and assented to by the plaintiffs. Defendant also relied upon the alleged fact that the valuation was omitted from the receipt by plaintiffs for the fraudulent purpose of concealing the fact that part of the furs were fine furs, so that they might escape the payment of that part of the rates on fine furs depending upon the value. To meet these positions plaintiffs relied upon the alleged fact that they had made a special agreement with one Hopkins, the agent of defendant, that they might ship fine furs, as well as coarse, at the rate of three dollars per hundred pounds, without any additional charge on fine furs of a per cent upon their value. This allegation was stoutly denied by defendant. On it the testimony is contradictory. It was a vital and closely contested question. Its determination would, from its bearing upon the turning points of the case, necessarily be, and was, very important.

Upon this vital question, Nathan Weil, the agent of the plaintiffs who filled out the body of the receipt for the signature of the

express company, as a witness, on cross-examination, having testified that he, in filling up the receipt, had erased from the printed blank the words "valued at," etc., in the receipt, and having testified that prior to March 20, 1872, plaintiffs had put a valuation on furs, and paid a charge thereon to the express company, but not for nearly a year before that date, plaintiffs' attorney asked the witness, against the objections of defendant, "Why?" and he answered, because he was "told by Mr. Boskowitz not to do it;" and, against like objection, testified that Boskowitz told witness "he had an understanding with the express companies that we were to pay no valuation charges; . . . that such was his understanding with Mr. Hopkins" (the agent of defendant), "that he was to pay no valuation,"—and to the ruling of the court in admitting proof of what Mr. Boskowitz had told witness, defendant excepted. This was clearly error. It is not perceived upon what ground the declaration of one of the plaintiffs, not made in the presence of defendant, or constituting any part of the *res gestæ*, could be allowed as proof against defendant. This proof had an important bearing upon a closely contested question of fact in the case, and must have had much weight with the jury in determining in favor of plaintiffs the conflict between the testimony of one of the plaintiffs on the one hand, and that of Hopkins, Colvin, and others, on the other hand. This was a vital point in the controversy, and for this reason alone the judgment in this case must be reversed.

It is proper, however, to notice other rulings on this trial. On the upper left hand corner of the receipt given for these furs was a memorandum, when put in evidence by the plaintiffs, thus:

170

180

—
350 = 2 bales mink.

185 = 1 skunk.

J. & A. B. }
A. & B. }

—
535

Weil, a witness for plaintiffs, had stated that this memorandum was put on this receipt before it was sent to the express office for signature. On cross-examination this witness had testified the weights of such packages were kept in the receipt book, and such weights were "most always" put on the receipt books. Peterson, who signed (for the company) the receipt given for these furs, testified for defendant that to the best of his knowledge that memorandum was not on that receipt when he signed it. He was asked whether or not it was customary for Boskowitz & Co., according to his observation, to put their weights on their receipts. The court ruled that he should not be allowed to answer this question, and defendant excepted. We think he ought to have been

allowed to answer the question, as a contradiction of the witness Weil. This witness had been in the service of the defendant company for many years, and for a long time had been the receiving clerk of the company when these goods were shipped. It was a question in dispute whether that memorandum was on the receipt when he signed it. Weil had sworn for plaintiff that he "most always" put the weights on the receipts. It certainly was competent to contradict him in that regard, and to that end prove that such a thing was not usual.

The instructions given to the jury, as a whole, were misleading, and in some respects palpably erroneous. The second instruction, given at the request of plaintiffs, was palpably misleading and unwarranted. It was misleading to say that the receipt contained on its face no agreement for an exemption from liability between plaintiffs and defendant, and it was misleading to assume that the exemption in the receipt was contained in a "contract with the United States Express Co." The only parties to the receipt are appellees and the Adams Express Co. The United States Express Co., on the face of the receipt, taking it ever so literally, in no manner appears as one of the contracting parties. If the word "said," in the receipt, immediately preceding the words "United States," were stricken out, that provision would, on its face, purport to be a contract between the Adams Express Co. and appellees in relation to the liability of the United States Express Co.; but it does not now, nor would it even then, purport to be a contract to which the United States Express Co. is a contracting party.

When this case was before this court on the appeal of J. & A. Boskowitz, it was held that there is in this receipt, on its face, such an ambiguity that as a matter of law it could not be held that this exemption related to the Adams Express Co.,—that whether it did or not must depend upon proof of the circumstances under which the contract was made. It does not follow that the receipt, on its face, is a contract with the United States Express Co. The proposition that the court had no warrant to declare, as a matter of law, that this provision in the receipt was a contract in relation to the liability of the Adams Express Co., does not at all sustain the proposition that as a matter of law the contract does not relate to the liability of the Adams Express Co. The proofs tend strongly to show that by the phrase, "said United States Express Co.," the parties meant the Adams Express Co. The United States Express Co. had not been mentioned above, and the Adams Express Co. had been mentioned. When, therefore, the phrase, "the said United States Express Co.," was used, it needed explanation from the circumstances. Either the word "said" must be rejected, or the words "United States" must be taken as a misnomer, wherein

the parties called the Adams Express Co. by a wrong name. The law, in the absence of proof, does not determine this question either way. What is the true intent of the parties giving or receiving this receipt must be determined by circumstances to be proved. It was therefore error to declare, as a matter of law, this to be a contract with the United States Express Co., as much, at least, as it was to declare that, as a matter of law, it was the contract of the Adams Express Co. It was held when this case was heretofore before this court, that whether this provision was or was not in fact a contract between appellant and appellees, depended upon matter dehors the writing. The matters depended upon proof. It was for the jury, and not for the court, to determine the truth as to matters outside of the writing.

By the fourth instruction the jury were told, in substance, that although the valuation clause in the receipt may have been known to plaintiffs, and though plaintiffs may have known that defendant intended it to apply to the Adams Express Co. and to this transaction, and although plaintiffs may have accepted the receipt with all this knowledge, and without objection thereto, and although they had agreed to pay a valuation charge on fine furs, and still omitted to state the valuation, all this would not be a fraud, and in the absence of fraud would constitute no defence. The terms of the instruction are at least calculated to convey that idea, and the instruction ought not to have been given.

It is not necessary to pass upon other alleged errors. For the errors indicated the judgment of the Appellate Court is therefore reversed, and the cause remanded, that the judgment of the trial court may be reversed and the cause sent back for a new trial.

Judgment reversed.

See *Graves v. Lake Shore & Michigan Southern Ry. Co.*, *infra*; *Texas Express Co. v. Scott*, and note, *infra*.

GRAVES

v.

LAKE SHORE AND MICHIGAN SOUTHERN RY. CO.

(*Advance Case, Massachusetts. March 4, 1884.*)

If a shipper voluntarily represents and agrees that the goods delivered to a common carrier are of a certain value and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such shipper is bound by his representation and agreement.

A railroad company received certain wines for transportation, giving a bill of lading in which it was stated that the wines were "shipped at an agreed valuation of \$20 per barrel." The wines were lost in transit by the negli-

gence of the company's servants: *Held*, that the company was liable only in the sum of \$20 per barrel.

THIS was a suit growing out of the destruction in transit of a consignment of seventy-five barrels of highwines, shipped July 29, 1882, by Bush & Brown, Peoria, Ill., to C. H. Graves & Sons, Boston, Mass., via Red Line Transit Co., and forwarded over the L. S. & M. S. Ry.

On July 31, 1882, a collision occurred on the L. S. & M. S. Ry. at South Bend, Ind., and the car containing the shipment consigned to Graves & Sons was completely burned.

A suit was commenced by Graves & Sons to recover \$6332.31, the actual value of the consignment, whereas the goods were shipped at an agreed valuation of \$20 per barrel, or \$1500 for the entire consignment.

This has resulted in a judicial opinion rendered by the supreme court of Massachusetts upon the special valuation clause in the contracts of the Red Line Transit Co.

Upon an agreed statement of facts in the case, a hearing was had May 22, 1883, in the superior court of Boston, Mass., upon the questions of law touching the validity of said contracts, and after a careful analysis of the authorities by the court, a decision was rendered in favor of the defendant.

Appeal was taken from this decision by plaintiffs to the supreme court of Massachusetts, and a decision was handed down by that court March 4, 1884, confirming the holding of the court below.

MORTON, C. J.—The defendant as common carriers received at Peoria seventy-five barrels of highwines, and agreed to deliver them to the plaintiff at Boston.

The bill of lading contained the stipulation that the goods were "shipped at an agreed valuation of \$20 per barrel, owners risk of leakage." It also contained the agreement that "in the event of the loss of any property for which responsibility attaches under this bill of lading to the carriers, the value or cost of the same at the time and point of shipment is to govern the settlement, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based."

The defendants had no knowledge of the value of the goods except that furnished by the statement of the shippers, and the charge for transportation was based upon this statement and valuation.

The goods were destroyed during the transit, by a collision of two trains, occasioned by the negligence of the servants of the defendant. The only question presented is whether the plaintiffs can recover any more than the agreed valuation of the goods.

The question whether a carrier can by a special contract exempt himself from liability for a loss arising from the negligence of him-

self or his servants, is one which has been much discussed, and upon which the adjudications are conflicting. If we adopt the general rule that a carrier cannot thus exempt himself from responsibility, we are of opinion that it does not cover the case before us which must be governed by other considerations. The defendants have not attempted to exempt themselves from liability for the negligence of their servants. They have made no contract for that purpose, but admit their responsibility; their claim is that the plaintiffs having represented and agreed that the goods are of a specified value, and having thus obtained the benefit of a diminished rate of transportation, are now estopped to claim in contradiction of their representation and agreement that the goods are of a greater value.

It is the right of the carrier to require good faith on the part of persons who deliver goods to be carried, or enter into contracts with him. The care to be exercised in transporting property and the reasonable compensation for its carriage depend largely on its nature and value, and such persons are bound to use no fraud or deception which would mislead him as to the extent of the duties or the risks which he assumes. It is just and reasonable that a carrier should base his rate of compensation to some extent upon the value of the goods carried. This measures his risks and is an important element in fixing his compensation.

If a person voluntarily represents and agrees that the goods delivered to a carrier are of a certain value, and the carrier is thereby induced to grant him a reduced rate of compensation for the carriage, such person ought to be bound by his representation and agreement. Otherwise, he imposes upon the carrier the obligations of a contract different from that into which he has entered. *Dunlap v. Inter-Steamboat Co.*, 98 Mass. 371; *Judson v. Western R. R. Co.*, 6 Allen, 486.

The plaintiffs admit that their valuation of the goods would be conclusive against them in case of a loss from any other cause except the negligence of the carriers or their servants, but contend that the contract does not fairly impart a stipulation of exemption from responsibility for such negligence. We cannot see the justice of this distinction.

Looking at the matter practically everybody knows that the charges of a carrier must be fixed with reference to all the risks of the carriage including the risk of loss from the negligence of servants. In the course of time such negligence is inevitable, and the business of a carrier could not be carried on unless he includes this risk in fixing his rates of compensation.

When the parties in this case made their contract it is fair to assume that both had in mind all the usual risks of the carriage. It savors of refinement to suppose that they understood that the valuation of the goods was to be deemed to be fixed if a loss oc-

curring from some causes, but not fixed if it occurred from the negligence of the servants of the carrier.

Such does not seem to us to be the fair construction of the contract. The plaintiffs voluntarily entered into the contract with the defendants, no advantage was taken of them, they deliberately represented the value of the goods to be twenty dollars per barrel, the compensation for carriage was fixed upon this value, the defendants are injured and the plaintiffs are benefited by this valuation if it can now be denied. We are of opinion that the plaintiffs are estopped to show that it was of greater value than that represented. The plaintiffs cannot recover a larger sum without violating their own agreement. Although one of the indirect effects of such a contract is to limit the extent of the responsibility of the carrier for the negligence of his servants, this was not the purpose of the contract. We cannot see that any considerations of a sound public policy require that such contracts should be held invalid, or that a person who in such contract fixes a value upon his goods which he entrusts to the carrier should not be bound by his valuation. *McCann v. Lond. & N. W. R. R.*, 7 H. & N. 437; s. c., 3 H. & C. 343; *Railroad Co. v. Fraloff*, 100 U. S. 26; *Musa v. American Exp. Co.*, 1 Fed. Rep. 382; *Hart v. Penna. R. R.* 7 Fed. Rep. 630; *Maguin v. Dinsmore*, 70 N. Y. 410.

We are therefore of opinion upon the facts of this case that it was not competent for the plaintiff to show that the value of the goods lost was greater than twenty dollars per barrel.

Judgment affirmed.

See *Adams Express Co. v. Boskowitz et. al.*, supra; *Texas Express Co. v. Scott*, and note, *infra*.

TEXAS EXPRESS CO.

v.

SCOTT.

(*Advance Case, Texas. November 28, 1883.*)

Where there is no special contract a common carrier is liable for all losses of, or injuries to goods, received by him for carriage, not occasioned by the act of God or public enemies.

Where a shipper of goods practises a fraud on a carrier, either by his acts or omissions, as to the value of the goods, fraudulently concealing their value from the carrier, such fraud will operate to discharge the carrier from liability.

A mere failure on the part of a shipper to inform a carrier as to the value of goods shipped, would not, per se, be such fraudulent concealment as to value as would discharge the carrier from liability.

A person shipping a trunk over a railroad company is not bound,

to disclose the fact that there is jewelry therein to the value of about \$465, unless asked. Particularly is this the case where the agent of the company receiving the goods fails to comply with a rule of the company requiring him to demand of the shipper of goods the value thereof.

A having sued a railroad company for the loss of a diamond ear-ring from a trunk committed to its care, was served with a subpoena duces tecum, one day only before the trial, commanding her to produce on the trial, a diamond ear-ring in her possession, being the match for the one alleged to be lost. She appeared as a witness in the case, and while on the stand was asked if she had brought the ear-ring, and stated she had not, because it had been sent out of the county before the subpoena was served upon her, and thereupon defendant moved to continue the case to give time to get the ring. *Held*, the motion was properly overruled, the diligence used to obtain the testimony being insufficient.

The decision of a question like the one stated above is, in a large degree, intrusted to the judge before whom the case is tried, and unless his ruling is clearly erroneous it should not be disturbed.

WILLSON, J.—This suit was brought by appellee to recover of appellant damages for failure to deliver to her in a safe condition a trunk and its contents, transported by appellant from Ennis, Texas, to Tyler, Texas.

It was in proof that appellant, a common carrier, received the trunk at Ennis for carriage to Tyler, to be delivered at Tyler to the appellee; that at the time the trunk was so received and shipped it was in good condition, and that no representations as to the contents of the same, or the value thereof, were made by the shipper of the trunk to the company's agent at Ennis, nor did the company's agent make any inquiries as to the contents or value of same, nor was any receipt executed and delivered at the time by the company's agent to the shipper of the trunk.

It was shown by evidence that among other things the trunk contained two diamond ear-rings, one set of coral ear-rings, one case of perfumery, one bisque ornament, all alleged to be of the aggregate value of \$465, and that the trunk was worth \$10 or \$12.

It further appears in evidence that appellee received the trunk at Tyler from appellant in a damaged condition, and that one of the diamond ear-rings was gone, the coral ear-rings, the perfumery and the bisque ornament were broken, destroyed and rendered valueless. Appellee recovered judgment against appellant for the sum of \$175 and interest and costs, from which judgment this appeal is prosecuted.

(1.) One day before the trial of the case appellee had been served, at the instance of appellant, with a subpoena duces tecum, commanding her to appear and produce in court, at the trial, the diamond ear-ring which was not lost, and which was transported to her in the trunk. Appellee appeared at the trial, and was a witness in the case in her own behalf, and upon cross-examination by appellant was asked if she had with her the diamond ear-ring she had been notified by the subpoena to produce. She answered that she

had not ; that said ear-ring, with other baggage, had been sent to Texarkana some three days before the trial, and before she was served with the subpoena duces tecum. Thereupon appellant made application to continue the case to enable it to have the ear-ring produced, that it might be examined by experts as to its genuineness and value, appellant alleging that it was not a genuine diamond, etc., and that it was precisely such a stone as the one alleged to have been lost, etc. This application was overruled by the court, upon the ground that the appellant had not used proper diligence to obtain the ear-ring, or an examination of it by experts.

We think the court did not err in overruling the application to continue. Appellant saw proper to announce itself ready for trial, and enter upon the trial of the case without inquiring of the witness, or making any effort to ascertain whether or not the ear-ring was present and could be produced on the trial. Nor had he used reasonable diligence, we think, to have it produced. One day's notice, under such circumstances, would not, in our opinion, constitute reasonable diligence. But, "the decision of a question of this character must, in a large degree, be entrusted to the judge before whom the case is tried, and unless his ruling is clearly erroneous it should not be disturbed." *Wiggins v. Fleishel*, 50 Tex. 57. We will not disturb it in this case, it appearing to us to be correct.

(2.) A common carrier is liable for all losses of, or injuries to goods received by him for carriage, not occasioned by the act of God or public enemies, and this liability cannot be limited by contract. *R. R. Co. v. Burke*, 55 Tex. 323, and authorities there cited ; *W. & W.'s Con. Rep.*, Secs. 118-174.

In the case before us the trunk was received by the agent of appellant for transportation, without any contract attempting to restrict in any way the liability of the company, and no question arises, therefore, upon any special contract made with reference to the trunk or its value.

(3.) We believe it to be a correct doctrine that where a shipper of goods practises a fraud on the carrier, either by his acts or omissions, as to the value of the goods, fraudulently concealing their value from the carrier, such fraud will operate to discharge the carrier from liability. *R. R. Co. v. Burke*, 55 Tex. 323, and authorities there cited.

In this case, however, there is no evidence showing a fraudulent concealment of the value of the trunk and its contents on the part of the shipper or any other person. It is shown by the evidence that by the rules of the company it was made the duty of its agents to inquire as to the value of articles received by them for shipment, and to execute a receipt to the shipper, specifying in the receipt the value of the goods. This duty was neglected by the company's agent in this case. He made no effort to ascertain the value of the trunk or its contents, and executed no receipt therefor

until after it had been shipped. Appellee cannot be prejudiced in her rights by this neglect of the company's agent.

(4.) Appellant complains that the court did not charge the law of the case, and refused a proper charge requested by appellant. We think the charge of the court is in no respect objectionable. Its propositions of law are well sustained by the authorities, and the entire charge is fair and applicable to the facts. As to the special charge requested by appellant, and refused by the court, we do not think the proposition presented by it is the law.

A mere failure on the part of the shipper to inform a carrier as to the value of the goods shipped by the carrier, would not per se, be such fraudulent concealment as to value, as would discharge the carrier from liability. It is asserted in the special charge refused that such mere failure would have the effect to discharge the carrier from liability. In support of this special charge appellant's counsel, in their briefs, have referred to several authorities, all of which we have not had opportunity to examine, some of them not being found in the library. In one of the cases it is said: "If the owner be guilty of any fraud, or imposition, in respect to the carrier, or by concealing the value, or nature of the articles, or deludes him by his own carelessness in treating the parcel as a thing of no value, or misrepresents a box to contain household goods when it contains medicines, he cannot hold the carrier liable," etc. *Cox v. Heisley*, 19 Penn. St. 243.

While the rule thus announced we believe to be correct, it does not, in our opinion, sustain the broad proposition contained in the special charge under discussion.

Another case referred to, *Pardee v. Drew*, 25 Wend. 458, is inapplicable to the case at bar, because that involved the question only as to the liability of a carrier for articles received for carriage as baggage, which were not baggage properly.

Section 565 of Story on Bailments, cited by appellant, does not sustain the proposition of the special charge. It is as follows: "It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or care and vigilance may be lessened. And if there is any such fraud, or unfair concealment, it will exempt the carrier from responsibility under the contract, or, more properly speaking, will make the contract a nullity.

This same author, in section 567 of the same work, says: "In cases of common carriers, where there is no notice, the better opinion seems to be that the party who sends the goods is not bound to disclose their value until asked." In support of this text the author, in a note, refers to numerous authorities.

Another case cited by counsel for appellant, *Orange County Bank v. Brown*, 19 Wend. 86, is inapplicable to this case, the question involved being the same as in *Pardee v. Drew*, supra. Nor is

the position of appellant sustained by the citation from Angell on Carriers, but on the contrary, we understand that author as laying down the rule as we have stated it. Angell on Carriers, 3 ed., Sec. 266. We apprehend that no well considered case can be produced which holds that mere silence as to the value of goods delivered to a carrier, is, of itself, sufficient to discharge the carrier from liability for the loss of such goods, although the goods were of unusual value.

(5.) As to the facts of the case, the testimony was not altogether free from conflict, but there was sufficient evidence, in our opinion, to warrant the verdict of the jury.

The judgment is affirmed.

Concealment of Value of Goods.—A person shipping goods by a common carrier is bound not to fraudulently conceal the value thereof. *Relf v. Rapp*, 3 W. & S. 21; *Coxe v. Hasley*, 19 Pa. St. 243; *Orange Co. Bank v. Brown*, 9 Wend. 116; *Ernest v. Express Co.*, 1 Woods, 573; *Belger v. Dinsmore*, 51 N. Y. 266; *Magnin v. Dinsmore*, 62 N. Y. 35; *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *St. John v. Express Co.*, 1 Woods, 612; *Hayes v. Wells*, 23 Cal. 185; *Everett v. Southern Express Co.*, 46 Ga. 303; *Cooper v. Berry*, 21 Ga. 526; *Great Northern R. Co. v. Shepherd*, 14 Eng. L. & Eq. 367; *McCance v. London & N. W. R. Co.*, 7 H. & N. 477; *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 59.

When not Bound to Disclose Value of Contents.—Where there is no improper means or artifice used to conceal the contents of a package and no question is asked by the carrier, the consignor is not bound to disclose the nature of the goods or their value. *Phillips v. Earl*, 8 Pick, 182; *Sewall v. Allen*, 6 Wend. 349; *Hollister v. Newlin*, 19 Wend. 234; *Southern Express Co. v. Crook*, 44 Ala. 468; *Gorham M'fg Co. v. Fargo*, 45 How. Pa. 90; *Camden and Amboy R. R. Co. v. Baldauf*, 16 Pa. St., 67; *Lebeau v. General Steam Nav. Co.*, L. R. 8. C. P. 88.

If he be asked as to the value, he must of course give true answers. *Walker v. Jackson*, 10 M. & W. 168; *Boskowitz v. Adams Express Co.*, 5 Cent. L. J. 58; *Graves v. Lake Shore and M. S. R. Co.*, and note, *supra*.

Notices.—According to some authorities if the carrier posts up a notice requiring shippers to inform him of the character and value of the merchandise shipped, he is not obliged to inquire from the shipper as to such merchandise, and it amounts to a fraud on the part of the shipper, if the articles be other than they outwardly appear, to remain silent. *Orange Co. Bank v. Brown*, 9 Wend. 145; *Batson v. Donovan*, 4 Barn. & Ald. 21; see contra, *Sleat v. Fagg*, 5 B. & Ald. 342; *Brooke v. Pickwick*, 4 Bing. 218; *Butt v. Gt. Western R. Co.*, 11 C. B. 140; *Garnett v. Willan*, 5 B. & Ald. 58; *Riley v. Horne*, 5 Bing. 217; *Bignold v. Waterhouse*, 1 Maule & S. 255.

CHICAGO, R. I. AND P. R. Co.

v.

CONKLIN.

(Advance Case, Kansas. May, 1884.)

Where the duly-authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage.

Where personal property is received by a railroad company to be transported as baggage, and while it is in the possession of the railroad company, to be so transported, it is lost or stolen, *held*, that the railroad company is responsible to the owner thereof for its loss.

ERROR from Atchison County.

VALENTINE, J.—This was an action brought before a justice of the peace by William Conklin, against the Chicago, Rock Island and Pacific R. R. Co., to recover damages for the failure on the part of the railroad company to transport or deliver certain personal property delivered by the plaintiff to the defendant to be transported as baggage. Afterwards the case was appealed to the district court, and, after judgment in that court in favor of the plaintiff and against the defendant for \$75 and costs, the defendant, as plaintiff in error, brought the case to this court on petition of error.

The errors complained of are based upon an alleged insufficiency of the plaintiff's bill of particulars. It is claimed—First, that the bill of particulars does not state any cause of action; and, second, that if it does state a cause of action, the cause of action stated is not the one which was proved on the trial of the case in the district court.

The bill of particulars states, in substance, among other things, that the property, which consisted of a certain canvas tent, with poles, ropes, and attachments, was delivered to the agent or baggage-master of the defendant, at Platte City, Missouri, to be shipped and forwarded, as baggage, on the first passenger train of the defendant, and that the defendant afterwards wholly failed and refused to deliver the property to the plaintiff, but kept and retained the same; and the bill of particulars did not state in terms that the plaintiff was or intended to become a passenger on the defendant's railroad, nor that the defendant was guilty of any negligence; and it is because of these failures on the part of the plaintiff's bill of particulars to state that the plaintiff was or intended

to become a passenger, or that the defendant was guilty of negligence, that the defendant below (plaintiff in error) claims that the bill of particulars is insufficient. We think the bill of particulars, however, is sufficient; that it states a cause of action; and that it sufficiently states the cause of action which was proved.

On the trial it was shown that the plaintiff delivered the property to the station agent of the defendant at Platte City, Missouri, to be transported as baggage on the first passenger train of the defendant going to Plattsburgh, Missouri; that the station agent so accepted such property; that the defendant afterwards wholly failed and refused to deliver the property to the plaintiff; and that the plaintiff, at the time, expected and intended to be a passenger on such passenger train, and had purchased a ticket of the defendant for that purpose.

The facts with reference to the delivery of the property to the defendant's station agent, stated more in detail, are as follows: The plaintiff took the property to the defendant's depot at Platte City, Missouri, and delivered it to the station agent at that place, to be transported as baggage on the first passenger train going to Plattsburgh, and the station agent accepted the property as baggage, but, being busy at the time, did not give the plaintiff any receipt or check or bill of lading for the same, but directed the plaintiff to leave the property with him until he could prepare a bill of lading for the plaintiff, and the plaintiff did so. Afterwards the plaintiff passed out of the depot for a short time, and in a few minutes afterwards returned, in order to get the bill of lading promised to him by the defendant's station agent; but the property, in the meantime, had been mislaid or stolen, and the station agent refused to give the plaintiff any bill of lading, or to account for the property in any other manner, and neither the station agent nor the defendant has at any time since accounted to the plaintiff for the property. The defendant's station agent knew what the property consisted of and accepted it as baggage, and we think the defendant must now account for it as baggage, although it might not, in strict language, be baggage; and, as the property was lost while in the possession of the defendant, we think the defendant is responsible for its loss.

The judgment of the court below will be affirmed.

Baggage.—As to what is and what is not baggage, see *Texas, etc., R. Co. v. Capps*, and note, *infra*.

TEXAS, ETC., R. Co.

v.

CAPPs.

(Advance Case, Texas. 1884.)

Although samples carried by a passenger are not personal baggage, yet, if the baggage master, knowing the character of the articles carried, accepts them as baggage, the carrier is estopped to deny that they were baggage in an action for their loss.

Although the liability of a common carrier is terminated after a reasonable time after the arrival of baggage at its place of destination, and although, if the station master at such place consents to hold such baggage for the owner, after such time, the carrier's liability continues, yet, if the station master be ignorant of the fact that it is not personal baggage, the company is not responsible, notwithstanding the former estoppel.

The burden of proof is upon the bailor of goods to show neglect on the part of a warehouseman in an action for the value of goods destroyed by fire.

WILLSON, J.—Appellee instituted this suit in justice's court to recover of appellant \$104.50, the alleged value of a trunk and its contents, shipped by him as baggage over appellant's road from Big Sandy to Longview, and destroyed in a fire which burned up appellant's depot at the latter place.

Appellee recovered judgment for the full amount of his claim, and for costs, in justice's court. On appeal by appellant to the county court, and upon a trial de novo, appellee's judgment was reduced to \$98 and all costs incurred in the justice's court, etc., and from this judgment appellant has appealed to this court.

1. It appears from the evidence that appellee's trunk contained one sample liquid cooler, nickel-plated; one ventilated beer faucet, one wrench and one lemon squeezer, which were samples being carried for the purpose of effecting sales.

It is contended by appellant, and correctly, that these articles did not constitute baggage. By baggage is understood such articles of personal convenience, or necessity, as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the same trunk of a passenger, but which are not, however, designed for any such use, but for other purposes, such as sale and the like. W. & W.'s Con. Rep., secs. 614, 1254, 1255; Hutchinson on Carriers, secs. 679, 685; Thompson on Carriers of Pass. 510.

2. But appellee replies to this that the trunk and its contents were received by the company as baggage, the agent of the company who received it as such having knowledge at the time of the contents of the trunk, and that therefore the company is estopped

by the act of its agent from now denying that the same was baggage. It was proved that at the time of taking passage upon the company's train with his trunk, the appellee notified the ticket agent of the appellant, from whom he purchased his ticket, that his trunk contained the sample liquid cooler, but it is not shown that this notice extended to other articles in the trunk. With this knowledge that the trunk contained the liquid cooler the ticket agent checked it to Longview.

We believe it to be a reasonable and correct doctrine that where a railroad company, through its ticket or baggage agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage, at least to the extent that its agent had notice of the character of the articles. *Butler v. Hudson River Railway*, 3 E. D. Smith, 571; *Redfield on Carriers*, sec. 78 and notes; 2 *Redfield on Railways*, p. 46 and notes; *Hutchinson on Carriers*, sec. 685.

3. But the evidence further shows that the trunk and its contents were safely transported by the company to Longview, the place to which the same had been checked, and were in the depot at that place subject to the order of appellee; that appellee, soon after the arrival of the trunk at Longview, called at the depot with his baggage check and informed the agent in charge that he contemplated travelling on the company's road again in a day or so, and the agent told him he could leave his trunk in the depot until he got ready to go on the train, and retain his baggage check until then. It is not proved, nor is it pretended, that the agent of the company at Longview had any knowledge of the contents of the trunk at the time he gave permission for it to remain in the depot, or at any other time. It is contended by appellee that as the agent at Longview allowed the trunk to remain in the depot upon the prospect of appellee's again becoming a passenger upon appellant's road, this would render the company liable for the trunk and its contents as baggage. As a general rule we believe this proposition to be correct. *Red. on Railways*, 39 and 40; *Red. on Carriers*, sec. 73.

But would this character of liability attach to the company when the articles left were not baggage, and when the company, through its agents at the place where so left, had no notice that the articles were not baggage?

In this case the agent of the company at Longview received the trunk as baggage, and without notice of its contents he allowed it to remain in the depot, and while there it was destroyed by a fire which also destroyed the depot. If he had received notice of the contents of the trunk, that the same were not properly baggage,

and with this knowledge had permitted it to remain in the depot with the prospect of appellee's taking passage on the road, we think the company would clearly be liable as a common carrier for its loss. But in the absence of such knowledge of the contents of the trunk on the part of the agent at Longview, we are of opinion that the liability of the company is that of a warehouseman, and not that of a common carrier. It is clear from the evidence that the trunk had reached its destination under the contract of carriage. That contract had been fully performed on the part of the company, and no further liability as a common carrier attached to the company in regard to the trunk. Any further liability as a common carrier could, therefore, be created only by a new contract, and in making any such contract neither the agent at Longview nor the company would be chargeable with the knowledge possessed by the agent at Big Sandy of the contents of the trunk.

4. With reference to the delivery of the goods to the consignee, this must be construed to mean that if the consignee, within a reasonable time, does not demand the goods, the carrier's liability as such will cease. In the case of baggage the rule seems to be that the responsibility as carrier continues until the owner has had reasonable time and opportunity to come and take it away. After that the responsibility as carrier ceases and the carrier becomes a mere warehouseman, and liable as such only. "It is the duty of a railway company in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call for and receive it, and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into its baggage-room and keep it for him, being liable only as a warehouseman. And the reasonable time within which the owner must call for it, is directly upon its arrival, making reasonable allowance for delay caused by the crowded state of the depot at the time, and the lateness of the hour makes no difference if the baggage be put upon the platform." *Quimit v. Henshaw*, 35 Vt. 605; *Hutchinson on Carriers*, 707, 712; *Edwards on Bailments*, sec. 227; *Story on Bailments*, sec. 213; *Redfield on Carriers*, sec. 73.

5. We are of opinion that the evidence in this case limits the liability of appellant for the loss of appellee's trunk and its contents to that of a warehouseman, and such being the case, and it being shown by appellant that the property was destroyed by fire, the burden of proof devolved upon appellee to show that the loss was occasioned by negligence on the part of appellant, its servants, employees or agents. *W. & W.'s Con. Rep.*, secs. 118, 412, 414; 2 *Texas Law Review*, 172.

There being no such proof in the record, the judgment must be reversed, and the cause remanded.

What Constitutes Baggage.—Ordinarily a railroad company accepting the baggage of a passenger for transportation is liable only for the loss of such articles contained therein as may ordinarily be considered proper for personal use. Articles not intended for or adapted to such use should be sent as freight. The following articles have been held to be properly comprised in the term baggage:

Clothing.—*Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178; *Dibble v. Brown*, 12 Ga. 217; *Baltimore, etc., R. Co. v. Smith*, 23 Md. 402; *Munster v. South Eastern R. Co.*, 4 C. B. (N. S.) 676.

Pistols.—*Woods v. Devin*, 13 Ill. 746; *Davis v. Michigan R. Co.*, 22 Ill. 278; *Chicago, etc., R. Co. v. Rollins*, 56 Ill. 212.

Guns.—When for sporting purposes. *Van Horn v. Kermit*, 4 E. D. Smith, 454, and see *Davis v. Cayuga, etc., R. Co.*, 10 How. Pr. 330; *Dawkins v. Hoffmann*, 6 Hill, 586.

Tools.—In reasonable quantity for a mechanic. *Davis v. Cayuga, etc., R. Co.*, 10 How. Pa. 330; *Porter v. Hildebrand*, 14 Pa. St. 129.

Opera Glass or Telescope.—*Cadwallader v. Grand Trunk R. R. Co.*, 9 Low. Can. 169; *Toledo, etc., R. Co. v. Hammond*, 33 Ind. 379.

Books and Manuscripts.—*Hopkins v. Westcott*, 6 Blatchf. 64; *Doyle v. Kiser*, 6 Ind. 242; *Gleason v. Goodrich Trans. Co.*, 32 Wisc. 85.

But see *Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262.

Surgical Instruments.—*Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262.

Watches and Jewelry.—When intended to be worn on the person. *McGill v. Rowland*, 3 Pa. St. 451; *McCormick v. Hudson River R. R. Co.*, 4 E. D. Smith, 181; *Fraeoff v. New York, etc., R. Co.*, 10 Blatch. 16.

What Does not Constitute Baggage.—The following articles have been held not to be included in the term baggage:

Bullion, Plate, Watches, Jewelry, and the like unless intended to be worn on the person. *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Michigan, etc., R. Co. v. Carraw*, 73 Ill. 348; *Cadwallader v. Grand Trunk R. Co.*, 9 Low. Can. Rep. 169; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219.

Samples of Travelling Salesman.—*Hawkins v. Hoffman*, 6 Hill, 586; *Alling v. Boston, etc., R. Co.*, 126 Mass. 121; *Stimpson v. Connecticut River R. Co.*, 98 Mass. 83.

Money.—Except the small amounts necessary for travelling expenses. *Merrill v. Grinnell*, 30 N. Y. 594; *Grant v. Newton*, 1 E. D. Smith, 95; *Whitmore v. Steamer Caroline*, 20 Mo. 518; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Dunlap v. International Steamboat Co.*, 98 Mass. 871; *Dibble v. Brown*, 12 Ga. 217; *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hickox v. Naugatuck R. Co.*, 31 Conn. 281; *Hutchings v. Western, etc., R. Co.*, 25 Ga. 61; *Phelps v. London, etc., R. Co.*, 19 C. B. (N. S.) 321; *Butcher v. London, etc., R. Co.*, 16 C. B. 13; *Illinois, etc., R. R. Co. v. Copeland*, 24 Ill. 332; *Cincinnati, etc., R. Co. v. Marcus*, 38 Ill. 219; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 584.

Some cases go so far as to hold that even a small sum to meet current travelling expenses is not baggage. *Davis v. Michigan, etc., R. Co.*, 22 Ill. 278; *Grant v. Newton*, 1 E. D. Smith, 95.

Presents.—*The Ionic*, 5 Blatch. 538; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

Toys.—*Hudston v. Midland, etc., R. Co.*, 10 Best & S. 504; s. c., L. R., 4 Q. B. 366.

Bedding.—*Connolly v. Warren*, 106 Mass. 146; *Macraw v. Great Western R. Co.*, L. R. 6 Q. B. 612; *Texas, etc., R. R. Co. v. Ferguson*, 9 Am. & Eng.

R. R. Cas. 395; But see *Hirschbohn v. Hamburg American Packet Co.*, 2 Jones & Sp. 521; *Ouimit v. Henshaw*, 85 Vt. 604.

Engravings.—*Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

Papers of Value.—*Thomas v. Great Western R. Co.*, 14 Upp. Can. Q. B. 389; *Phelps v. London, etc., R. Co.*, 19 C. B. 321.

Property of Other Persons.—Ordinarily a passenger cannot include in his baggage the effects of other persons. If he does so a railroad company will not be responsible for loss or injury. *First National Bank v. Marietta, etc., R. Co.*, 20 Ohio St. 260; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326; *Chicago, etc., R. Co. v. Boyle*, 73 Ill. 510; *Mississippi, etc., R. Co. v. Kennedy*, 41 Miss. 671; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Becker v. Great Eastern R. Co.*, L. R. 5 Q. B. 241.

But members of the same family travelling together, may carry each other's effects. *Dexter v. Syracuse, etc., R. Co.*, 42 N. Y. 326; *Curtis v. Delaware, etc., R. Co.*, 74 N. Y. 116.

When Railroad Company Becomes Liable as Warehouseman.—A passenger is bound to call for, claim and take away his baggage within a reasonable time; if he fails so to do the company may deposit the baggage in a safe place and be thereafter liable as warehouseman only. *Mattison v. New York, etc., R. Co.*, 57 N. Y. 552; *Chicago, etc., R. Co. v. Fairclough*, 52 Ill. 106; *Burnell v. New York, etc., R. Co.*, 45 N. Y. 184; *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227; *Mote v. Chicago, etc., R. Co.*, 27 Iowa, 22; *Ross v. Missouri, etc., R. Co.*, 4 Mo. App. 588; *Dimminny v. New York, etc., R. Co.*, 49 N. Y. 546; *Roth v. Buffalo, etc., R. Co.*, 84 N. Y. 548; *Chicago, etc., R. Co. v. Boyle*, 73 Ill. 510; *Holdridge v. Utica, etc., R. Co.*, 56 Barb. 191; *Louisville, etc., R. Co. v. Mahan*, 8 Bush. 184; *Jones v. Norwich Trans. Co.*, 50 Barb. 193; *Penton v. Grand Trunk R. Co.*, 26 Upp. Can. Q. B. 367; *Patscheider v. Great Western R. Co.*, L. R., 3 Exch. Div. 153.

But until the goods are stowed in a place of safety the railroad company remains liable as a common carrier. *Mote v. Chicago, etc., R. Co.*, 27 Iowa, 22; *Bartholomew v. St. Louis, etc., R. Co.*, 53 Ill. 227; *Chicago, etc., R. Co. v. Fairclough*, 52 Ill. 106; *Mattison v. New York, etc., R. Co.*, 57 N. Y. 552.

ST. LOUIS, KANSAS CITY AND NORTHERN RY. CO.

v.

CLEARY.

(77 *Missouri Reports*, 634.)

A written contract, containing provisions limiting the liability of a railroad company, as a common carrier, in the transportation of cattle: *Held*, in the absence of fraud or mistake, to be the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the cattle were loaded into the cars with a previous verbal understanding as to the terms of shipment, and presented to him for signature when there was no sufficient time for its examination before the departure of the train.

An instruction, submitting a question of law to the court sitting as a jury, is properly refused.

An instruction, which is, under the pleadings and evidence, a mere abstraction, is properly refused.

APPEAL from Carroll Circuit Court.

Hale and Eads for appellant.

Wells H. Blodgett for respondent.

NORTON, J.—This suit was instituted in the circuit court of Carroll county, to recover of defendant the sum of \$125.50, for transporting six car loads of cattle from Kansas City to Norborne.

It is averred in the petition that plaintiff and defendant entered into a special contract in writing, whereby the plaintiff undertook to transport for defendant six car loads of cattle from Kansas City to Norborne at \$20.50 per car, which it was averred was a reduced rate, in consideration of the undertaking and agreement of defendant to take care of said cattle while on the trip, load and unload the same at his own risk and expense, and that plaintiff should not be responsible for any loss, damages or injury which might happen to said freight in loading, forwarding or unloading, etc. It is also averred that in said contract defendant agreed that any claim for damages that might accrue under said contract, should be made in writing to the general freight agent of defendant within five days after the cattle were unloaded at the place of destination. It is also averred that plaintiff shipped said cattle in pursuance of the contract, and that defendant has failed and refused to pay the price agreed upon.

Defendant, in his answer, admitted that he executed the contract sued upon, but averred that before the same was executed by him, he had verbally agreed with plaintiff as to the number of cars, the price to be paid per car, the time of shipping the stock and the manner in which they were to be shipped, and that after said cattle had been loaded in the cars under said verbal contract, and while the train was about starting, and did within a very few minutes thereafter start, the contract set forth in plaintiff's petition was presented to defendant for his signature and "under the impression that said written contract contained substantially the contract that had been previously agreed upon, the defendant, not having time to read the same before the train started, signed the same without any knowledge on his part that it contained the reservations and exceptions therein contained." The answer further set up, by way of counter-claim, that by reason of delays, occasioned by the negligence of plaintiff, defendant's cattle were injured to the amount of \$250, which he asked to be set off against plaintiff's claim and for judgment in his favor for the balance.

The cause was tried by the court without the intervention of a jury, and judgment was rendered for plaintiff for \$125.50, from which defendant has appealed to this court.

On the trial, evidence was introduced tending to prove the aver-

ments of the petition, and also evidence tending to prove the allegations of the answer, and the only ground relied upon for a reversal of the judgment is the action of the court in refusing the following instructions asked by defendant:

1. If the cattle referred to in the pleadings and testimony were actually loaded into the cars of plaintiff, as stated in the answer, before the alleged written contract was signed, and were received by the agent of the company with the previous verbal understanding as to the terms of shipment, then the rights and liabilities of the parties to said shipment were fixed, and the liabilities of plaintiff thereunder as common carriers were not modified or changed by said written contract.

2. The liability of plaintiff in this case is that of a common carrier, and not a forwarder merely, and the stipulation to that effect in the alleged written contract, is void.

3. The cause of action set up by the defendant in his answer and counter-claim is founded on the alleged wrongful, willful and negligent acts and conduct of plaintiff, and not on the written contract set up in the petition.

4. If the defendant had not the time before the alleged departure of the train after the cattle were loaded, to examine the printed and written conditions of the written contract set up in the petition, and if defendant was leaving on said train with his cattle, to look after and care for same, then any conditions or stipulations in said contract inconsistent with plaintiff's general liability as a common carrier, are void.

While it has been held that a common carrier cannot stipulate against liability for damages resulting from and occasioned by his negligence, it has also been held, he can by special contract with the shipper, limit his liability. *Ketchum v. American Ex. Co.*, 52 Mo. 390; *Read v. St. Louis, K. C. & N. Ry. Co.*, 60 Mo. 199; *Rice v. Kansas Pac. Ry. Co.*, 63 Mo. 314; *Sturgeon v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 569. It was held in the case of *O'Bryan v. Kinney*, 74 Mo. 125, that "as a general rule, when goods are delivered to a carrier for transportation and a bill of lading or receipt is delivered to the shipper, he is bound to examine and ascertain its contents, and if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. That he, the shipper, did not read the bill of lading or know its contents, makes no difference; he might have read it and it was his duty to do so, and in the absence of fraud or mistake, the writing must be taken as the sole evidence of the final agreement of the parties." The same principle is announced in the case of *Mulligan v. Ill. Cent. Ry. Co.*, 36 Iowa, 181, where the terms of a bill of lading were sought to be evaded on the ground that the shipper did not know its contents. It was held: "It not appearing that any fraud or imposition was prac-

ticed, or that any mistake intervened, the plaintiff must be conclusively presumed to have been acquainted with its contents, and if he did not do so, the consequences of his folly and negligence rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limit it would finally admit." The same doctrine is announced in the cases of *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 79; *Grace v. Adams*, 100 Mass. 505; s. c., 1 Am. Rep. 131.

Giving force and effect to the above principles, the instructions numbered one and four were properly refused.

Instruction number two was properly refused, because it submitted a question of law and not of fact. Whether the liability of plaintiff was that of a common carrier as contradistinguished from that of a forwarder was determinable by the facts, and the facts upon which the liability of plaintiff as a common carrier were predicated should have been stated, so that the triers of the fact could determine whether such facts had been established by the evidence. It makes no difference in this respect that the cause was tried by the court without the intervention of a jury, and this has been so held in the case of *Cape Girardeau Co. v. Harbison*, 58 Mo. 90.

As to the third instruction, while it states correctly that the cause of action set up in defendant's answer by way of counterclaim, is founded upon the alleged negligence of plaintiff, it is nevertheless true that under the terms of the contract relied upon by plaintiff, defendant was bound to give notice in writing of his claim for damages to the general freight agent within five days after the cattle were unloaded, and it is not pretended that this was done, or any reason shown why it was not done, and it, therefore, follows that no injury could have resulted to defendant by refusing an instruction which, when considered in connection with the pleadings and evidence, was a mere abstraction.

Judgment affirmed, in which all concur, except Judge Ray, who was of counsel in the case.

See *Hopkins v. St. Louis & San Francisco Ry. Co.*, and note, *infra*.

HOPKINS

v.

ST. LOUIS AND SAN FRANCISCO RY. CO.

(Advance Case, Kansas. 1888.)

A. entered into a verbal contract with a railroad company in regard to the carriage of live stock whereby the latter agreed to allow him the usual rebates in freight. Subsequently, upon the shipment of each car load of live stock, a bill of lading was delivered containing no stipulations for such rebates. In an action by A. against the railroad company to recover the amount of the rebates, *held*, that the plaintiff could not establish by parol evidence the fact that it was the intention of the parties that the bill of lading should operate only as regards the liability of the company, and that as to all other matters the written contracts were subject to and controlled by the previous parol agreement. *Held*, therefore, that plaintiff was not entitled to recover the rebates.

THE plaintiff with leave of the court, filed his amended bill of particulars against the St. Louis & San Francisco Ry. Co., alleging that the latter company is justly indebted to the plaintiff in the sum of \$270.

That said sum is and was at the commencement of this action due and wholly unpaid; that during all of the two years last past said defendant was and now is operating, controlling and managing a line of railroad from the city of Wichita, in the State of Kansas, in and through this county of Wilson, to the city of St. Louis, in the State of Missouri; that during all said time said defendant was and now is engaged in the business of common carriers, both of passengers and of live stock of all kinds, and other freights, using said line of railroads and the rolling stock thereto belonging for that purpose. That during a portion of said time, said plaintiff was engaged in the business of buying hogs and cattle, and shipping the same from said county of Wilson to said city of St. Louis, in the cars of said defendant, and over said defendant's line of railroad aforesaid which shipments amounted to twenty-seven car loads of stock aforesaid; that prior to the shipping of said twenty-seven car loads as aforesaid, the said plaintiff entered into an agreement and contract with said defendant, by the terms of which agreement said defendant was to carry said plaintiff's stock at as low rates and for the same price per car that defendant charged and actually received from any other person or persons for like services; that plaintiff was to have and receive the same rebates and drawbacks that the defendant gave to any other person or shipper, or was allowed to any person for like shipments over said line of railroad during the time and times said

plaintiff was making his shipments. Plaintiff avers that said defendant violated said agreement in this: That said defendant charged him, the said plaintiff, the same rate per car, which rate was full schedule rates; that said defendant pretended to charge other and like shippers for same services, but which was in fact ten dollars on the car more than that charged to and received from other and like shippers; that is to say that said plaintiff paid \$60 from Neodesha in this county and \$65 from Fredonia in this county to St. Louis per car, when in truth and in fact said defendant charged and received from other and like shippers only \$50 from said Neodesha, and \$55 from said Fredonia to said city of St. Louis per car; that said difference of ten dollars on the car was made by said defendant paying and causing to be paid to said shippers a rebate and drawback of ten dollars on a car; that said plaintiff presented to said defendant his claim for drawbacks and rebates in the manner and form and at the place designated and required by said defendant, and in the manner and form and at the place done by other and like shippers for similar and like services, but that said defendant with the intent to cheat and defraud the plaintiff, did then and there, and has ever since continued, failed and refused to pay and allow said rebate and drawback or any part thereof, though said plaintiff had shipped all of said twenty-seven car loads of stock as aforesaid, and had paid to said defendant said full rate of \$60 and \$65 all of which said defendant then and there well knew.

Plaintiff says that at all time and times while engaged in buying and shipping all of said twenty-seven car loads of stock, as aforesaid, he relied upon the statements made by said defendant concerning the rates to be charged by said defendant and upon the agreement and contract as above set forth. Plaintiff therefore prays judgment against said defendant for the sum of two hundred and seventy (\$270) dollars and costs.

The defendant made answer as follows:

Comes now the defendant by its attorney and having obtained leave therefore for his answer to the bill of particulars, says that it denies each and every allegation in said bill of particulars contained.

For a further defence and answer defendant alleges that prior to receiving each car of stock mentioned in said bill of particulars, it, the St. Louis & San Francisco Ry. Co., entered into a contract in writing with the plaintiff by the terms of which the said defendant undertook to ship each car of stock mentioned at the sum of \$50 for each car load, and it was further stipulated in each of said contracts that in consideration of said rate being a less sum than the regular rates charged from said points to the city of St. Louis, the said plaintiff assumed all risk in shipping stock.

To this, plaintiff filed the following reply:

Now comes the plaintiff, and for answer and reply says that he

did, at the time of shipping each car load of stock, enter into a written contract with said defendant in manner and form as did other and like shippers; that a copy of one of said contracts is hereto annexed marked "A" and made a part hereof; that all the other written contracts made between said plaintiff and defendant at the time of shipping were similar in form, save as to dates, number of cars, and place of shipment, and price per car, which place of shipment was sometimes at Fredonia, and in that case the price per car inserted in said contract was \$65 per car. Plaintiff says that each of said written contracts only operated, and it was the understanding of the parties thereto, that it should operate, to fix the responsibility of the defendant as to any damages said plaintiff might sustain on the stock so shipped; that the same consideration was set forth in the written contracts of said other and like shippers, and as it is the custom and practice of said defendant to do and make in all cases of like shipments; that, notwithstanding said written contracts, said defendants paid to other and like shippers a rebate and drawback of ten dollars per car; that at the time said plaintiff entered into each and all said written contracts, he, the said plaintiff, relying upon the prior agreement understood and believed that he would and should be entitled to receive the usual rebates and drawbacks allowed to other and like shippers.

DUPLICATE.

No. OF CAR.	INITIALS.
8147	4
8852	"

RULES AND REGULATIONS FOR THE TRANSPORTATION OF
LIVE STOCK.

Live stock of all kinds at the following estimated weights, first class rates: One horse, mule, or horned animal, 2000 lbs.; two horses, mules, or horned animals, 3500 lbs.; three horses, mules, or horned animals, 5000 lbs.; each additional animal to be rated at 1000 lbs.; stallions 4000 lbs.; calves and sheep, one, two hundred pounds, but in no case less than 50 cents; pigs and store hogs actual weight.

In case the owner or consignor agrees to save the St. Louis & San Francisco Ry. Co. from liability for any or all of the causes enumerated in the following contract, and also agrees to load, un-

load, feed, water and attend to the stock himself, etc., as specified therein, the special rates of tariff based on such contract will be given.

The said St. Louis & San Francisco Ry. Co., as aforesaid, will not assume any liability over one hundred dollars per head on horses and valuable live stock, except by special agreement.

For the purpose of taking care of the stock the owner or men in charge will be passed on the train with it, and all persons thus passed, are at their own risk of any personal injury from any cause whatever, and must sign release to that effect, endorsed on contract.

LIVE STOCK CONTRACT.

NEODESHA STATION, August 2, 1880.

This agreement made between the St. Louis & San Francisco Ry. Co., of the first part, and J. M. Hopkins, of the second part witnesseth: That whereas the said St. Louis & San Francisco Ry. Co., as aforesaid, transports live stock only as per above rules and regulations, now, in consideration that the said party of the first part will transport for the party of the second part, two car loads of hogs to the St. Louis (Mo.) station, at the rate of sixty dollars (\$60) per car load, the same being a special rate, lower than the regular rates mentioned in their tariff, the said party of the second part hereby releases said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire,—and from any liability for any delay in shipping said stock after the delivery thereof to the agent of said party of the first part, or for any delay in receiving the same after being tendered to said agent.

And said party of the second part hereby accepts for such transportation the cars provided by said first party and used for the shipment of said stock, and hereby assumes all risk of injury which the animals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk of damage which may be sustained by reason of any delay in such transportation, and all risk of escape, or robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from the wilful negligence of the agents of the party of the first part.

And said party of the second part further agrees that he will load, unload and re-load said stock at his own risk, and feed, water and attend to the same at his own expense and risk while it is in the stock-yards of the party of the first part awaiting

shipment and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose.

And it is further agreed that said party of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened so as to prevent the escape of said stock therefrom.

And it is further agreed that in case the said party of the first part shall furnish laborers to assist in loading and unloading said stock at any point they shall be subject to the orders and deemed the employees of the said party of the second part while so assisting.

And for the consideration before mentioned, said party of the second part further agrees that as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock.

This contract does not entitle the holder or other parties to ride in the cars of any train, except the train in which his stock referred to herein is drawn or taken. Neither does it entitle him (and the party of the second part named in this contract expressly so stipulates, admits, and agrees) to return passage from St. Louis to Neodesha, unless this said contract is presented within ten days from the date hereof. Nor does it entitle any person except the party of the second part and parties who accompany him in charge of said stock, for the purpose of assisting him in taking care of the same, as specified in and upon this contract, and does not include women, infants or other persons unable to do and perform the services required as expressed in this contract, to such return passage within the said ten days; the object, purpose and intent of the return pass being to enable the said party of the second part hereto, or his men in charge as expressed in contract, and no other person, to return to Neodesha thereon at any time within ten days from date hereof, and not thereafter.

And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road; and the said party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the St. Louis & San Francisco Ry. Co., excepting to protect the through rate of freight named herein.

The evidence that the said party of the second part after a full

understanding thereof assents to all the conditions of the foregoing contract, is his signature hereto.

M. S. HILTON, Agent for St. Louis & San Francisco Ry. Co.

J. M. HOPKINS, Shipper.

Witness :

J. B. KEYS.

(Executed in duplicate.)

At the September term of the court for 1881, the case was heard on the motion of the defendant for judgment on the pleadings. Judgment was entered thereon and plaintiff excepted and now brings the case here.

James A McHenry for plaintiff in error.

S. S. Kirkpatrick for defendant in error.

HORTON, C. J.—If we can say upon the pleadings filed by the parties, that the defendant was entitled to judgment, it cannot be said that the court below committed any material error. *Douglas v. Reneardt*, 5 Kas. 392. Prior to the execution of the written contract set forth in the pleadings, it is alleged that a verbal contract was entered into between plaintiff and defendant, whereby if the former shipped live stock over the latter's line of road from Neodesha and Fredonia, Kansas, to St. Louis, Missouri, plaintiff was to have the usual rebates allowed like shippers of live stock over the road. This verbal contract is contrary to and in conflict with the subsequent written contract. It is the general rule that oral evidence is not competent (in the absence of fraud or mistake) to show that the parties stipulated at or before the execution of the written contract for something contrary to what is there expressed or to what is legally implied. While it is true, that a written contract does not exclude the possibility of a valid contemporaneous parol contract, yet, in such cases the parol contract must be separate and independent from the written one, and must in no respect be contradictory or conflicting therewith. Again, parol evidence is sometimes competent to explain the understanding of the parties where a contract is partly written, and partly verbal, but in the case at bar, none of these exceptions apply. Plaintiff could not recover upon the pleadings unless it were competent for him to establish by oral evidence that the written contracts entered into by him at the time the cars of stock were shipped were subject to and controlled by the previous parol agreement. This could not be done. *Weeks v. Medler*, 20 Kas. 57; *Railway v. Maddock*, 18 Kas. 546; *Cornell v. Railway*, 25 Kas. 613.

The judgment of the district court will be affirmed.

All the justices concurring.

Parol Evidence to Vary Terms of Bill of Lading.—The bill of lading embodies the contract between the parties, and is not capable of being

altered or varied by parol evidence of what took place before or at the time of concluding the contract of carriage. *Southern Express Co. v. Dickson*, 94 U. S. 549; *Indianapolis, etc., R. Co. v. Remmy*, 31 Ind. 518; *Oppenheimer v. United States Ex. Co.*, 69 Ill. 62; *Long v. New York Central R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; *Collender v. Dinsmore*, 55 N. Y. 200; *Pemberton Co. v. New York Central R. Co.*, 104 Mass. 144; *Hinckley v. N. Y. Central R. Co.*, 56 N. Y. 429; *St. Louis, K C. & N. R. Co. v. Cleary*, supra. But see *Memphis & Montgomery R. Co. v. Jurey*, infra.

Liability cannot be Limited after Goods once Delivered by Subsequent Bill of Lading.—But where goods are shipped under a parol contract, the carrier cannot subsequently limit his liability by delivering a bill of lading to the carrier containing clauses to that effect. *Coffin v. New York Central R. Co.*, 64 Barb. 379; *Shelton v. Merchants' Dispatch Co.*, 38 N. Y. 527; *Bostwick v. Baltimore, etc., R. Co.*, 45 N. Y. 712. But see *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351.

Liability cannot be Limited after Loss.—Where the goods have been destroyed a carrier cannot exempt himself from liability by delivering a bill of lading with clauses limiting his liability. *Detroit, etc., R. Co. v. Adams*, 15 Mich. 458; *Gott v. Dinsmore*, 111 Mass. 45; *Wilde v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 247; *Cleveland, etc., R. Co. v. Perkins*, 17 Mich. 296.

Supplementary Parol Contract.—It is competent to show a supplementary collateral agreement as to transportation by parol. *Dixon v. Columbus, etc., R. Co.*, 4 Biss. 187; *Chouteaux v. Leech*, 18 Pa. St. 224; *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77; *Malpas v. London, etc., R. Co.*, L. R. 1. C. P. 336.

Fraud or Mistake.—Where the written bill of lading is accepted through fraud or mistake, the impression left on the mind of the shipper being that a parol agreement which he has entered into is substantially embodied, the carrier is not exempt from liability. *Strohn v. Detroit, etc., R. Co.*, 21 Wisc. 554.

MOBILE AND MONTGOMERY RY. CO.

v.

JUREY.

(*Advance Case, Supreme Court of the United States. May 5, 1884.*)

The contract of a common carrier to transport goods may be by parol or in writing. Where a contract in writing is shown not to be the contract of the parties, it may be varied by parol.

When it is called upon to construe a paper writing open to construction, it is the right and duty of the court to look not only at the language, but to the subject-matter and surrounding circumstances.

An instruction that a bill of lading contained no restriction upon the liability of a railroad company as a common carrier, although its terms said it did, *held*, not erroneous in the light of surrounding circumstances.

The judgment of a circuit court, which appears from the record to have been right, will not be reversed for an error without prejudice.

The payment of a total loss by an insurer works an equitable assignment to him of all the remedies which the insured has against a common carrier

for the destruction of property entrusted to its care. The suit may be brought in the name of the nominal plaintiff, and the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right of recovery.

The effect of section 2891, Alabama Code, is to make the party for whose use the suit is brought dominus litis, and to give it the rights of an assignee of the cause of action.

Under section 2981, Alabama Code, in a suit brought by one person for the benefit of another, a plea of payment which does not allege a payment to the beneficial plaintiff, or to the person holding the legal title before the former acquired his right, is bad, and a demurrer to it will be sustained.

Where a charge to a jury contains two propositions, only one of which is correct, the judgment will not be reversed upon a general exception.

In error to the Circuit Court of the United States for the Middle District of Alabama.

The defendants in error, Jurey and Gillis, brought this action for the use of the Factors' and Traders' Insurance Company against the plaintiff in error, the Mobile & Montgomery Ry. Co., to recover \$12,000 for the failure of the latter to deliver certain cotton which had been placed in its possession as a common carrier. The complaint, which was drawn according to the form prescribed by the Code of Alabama, was as follows: "The plaintiffs claim of the defendant the sum of twelve thousand dollars as damages for the failure to deliver certain goods, viz., one hundred and ninety-seven bales of cotton, weighing ninety-six thousand nine hundred and thirty-six pounds, received by the defendant, as a common carrier, to be delivered to the plaintiffs at New Orleans, La., for a reward, which it failed to do." The railroad company pleaded the following pleas: "(1) The defendant, for answer to the complaint, says it is not guilty of the matters alleged therein. (2) For further answer to the complaint the defendant says that the plaintiffs, the said Jurey and Gillis, were paid the damages for the recovery of which this suit is brought, before the action was commenced." The plaintiffs demurred to the second plea. The demurrer was sustained. The cause was then tried on an issue joined on the first plea, and resulted in a verdict and judgment for the plaintiffs of \$10,344.25. The defendants have by this writ of error brought the judgment under review.

David Clopton and Thos. G. Jones for plaintiff in error.

D. S. Troy, H. C. Tompkins, and Henry C. Semple, for defendants in error.

Woods, J.—All the evidence in the case is set out in the bill of exceptions taken at the trial. It tended to show the following facts: The cotton mentioned in the complaint was delivered at Montgomery, Alabama, by the defendants in error, Jurey & Gillis, to the plaintiff in error, the railroad company, to be transported to New Orleans, and there delivered to the shippers. The cotton consisted of 264 bales. The train upon which it was

shipped was made up as follows: There were eight or ten box cars next to the engine; behind these were four flats loaded with the cotton, not covered by tarpaulins; and next to them, and last of the train, was a cab car in which the conductor rode. There were two men with buckets of water, besides the conductor and brakemen, to watch the cotton. While running down grade at about twenty miles an hour, and when the engine was not emitting any sparks, the signal to halt was given by the bell, and the cotton was discovered to be on fire. Every effort was made to stop the train as soon as possible, and when this was done, the hands on the train did what they could to save the cotton; but the fire was too hot, and the burning cars and cotton were consumed. The woods, through which the train was running when the fire occurred, were on fire, and the woods were frequently burning along the defendant's road at that time of the year. It further appeared that all the cotton loaded on the platform cars, consisting of 197 bales was consumed, and, of course, never delivered to Jurey & Gillis.

The contract for the transportation of the cotton was made by Jurey with T. K. Scott, the agent of the railroad company in Montgomery. Jurey testified: "I arranged with Scott to take the two hundred and sixty bales to New Orleans at two dollars per bale. When the cotton was ready for shipment and hauling to the railroad depot I again visited Mr. Scott at the company's office in Montgomery, in order to ascertain when my risk ceased and that of the company began, and Scott answered that as soon as the cotton was delivered on the railroad platform the cotton would be at the risk of the company." Jurey further stated: "I contracted with the railroad company, through its agent, Mr. Scott, to deliver the cotton in New Orleans for two dollars per bale, with the distinct understanding that it was at the railway company's risk as soon as delivered on its platform at Montgomery. After the cotton had been destroyed by fire I saw the bill of lading for the first time, and noticed that risk by fire was excepted. I immediately went to Mr. Scott and called his attention to it, and that such was not our agreement. The bill of lading was obtained by Mr. C. Hall, the broker in the premises. I paid an outside rate of freight in consideration of having the cotton transported without any exceptions or conditions." He further stated as follows: "We have been paid by the Factors' & Traders' Insurance Company, of this city (New Orleans), by reason of its having been covered under our open policy, and this suit is for the use and benefit of that company as subrogee of our rights, because we reinsured the cotton in that company notwithstanding that defendant had guaranteed its delivery. Scott testified that, while the cotton was being delivered on that railroad platform at Montgomery, and before the signing of the bill of lading, Jurey asked him if the company would be responsible in the event the cotton was burned on the

platform or in the cars, and he replied it would be in either event. Crenshaw Hall testified that he was a cotton broker in Montgomery, and acted for Jurey in delivering the cotton at the railroad company's depot; that he made no agreement and had no understanding with the railroad company in regard to the rate of freight, but simply sent the cotton to the depot by order of Jurey, Jurey told him that he himself would make the contract with the railroad company, as he thought he could get better rates. When the cotton was all delivered at the depot, witness received a bill of lading therefor. When the bill was delivered to him, Jurey, according to his recollection, was in the country, ten miles from Montgomery, and did not return until news had been received of the burning of the cotton. The bill of lading was signed in the handwriting of M. H. Sayer, a freight clerk at the depot of the railroad company in Montgomery. It was as follows:

"MOBILE AND MONTGOMERY RAILWAY COMPANY.

"Received from C. Hall, two hundred and sixty-four (264) bales cotton, ————of which are in bad order, marked as stated below, and consigned to Jurey & Gillis, to be transported and delivered to same, New Orleans, at the rate of ————. And, in consideration of the above rate, it is agreed upon and distinctly understood that the shipper releases the Mobile & Montgomery Ry. Co. and connections from all liabilities for any loss or damage that may occur from the bursting of ropes and bagging, old damage, wet, or from fire while upon their roads."

Then followed a statement of the number of bales of cotton and the marks. At the foot of the bill were the words and figures: "Frt. \$2.00 bale."

The court, of its own motion, among other instructions, gave the jury the following: "That the ground taken in argument by counsel for the railroad company was not the law; to wit, if Jurey & Gillis, before the commencement of the suit, had been paid by the Factors' and Traders' Insurance Co., as insurers, paying the loss it had insured against, and if Jurey & Gillis had no interest in the recovery, then the insurance company was the real plaintiff, and the burden of proof was on it to show the jury, by satisfactory evidence, how much it had so paid; and that if it failed to do so, or to give the jury evidence to enable them to determine satisfactorily what its loss or damage was, then nothing more than nominal damages could be recovered." The court further charged the jury, of its own motion, that if the plaintiffs were entitled to recover, the measure of the damages would be the value of the cotton at New Orleans, where it was to have been delivered, together with interest on said sum so ascertained, at the rate of eight per cent per annum, from the time when the cotton ought to have been delivered. The court, at the instance of the plaintiff's coun-

sel, gave the following instruction : " That the paper read in evidence by the defendant as a bill of lading, contains no restriction upon the liability of the defendant as a common carrier."

The defendant asked the court to give the jury the following instructions : "(1) If the jury find from the evidence that Jurey & Gillis insured said cotton in and by the Factors' & Traders' Insurance Co., for whose use this suit is brought, then, upon the loss of the cotton by fire, and payment of the insurance money by the insurance company to Jurey & Gillis, the insurance company was subrogated to the rights of Jurey & Gillis, and can maintain a suit in the name of Jurey & Gillis for their use to recover the amount paid by them to Jurey & Gillis ; but upon these facts the plaintiffs cannot recover under the complaint in this case, and if the jury find such to be the facts, they must find for the defendant. (2) If the jury find from the evidence that Jurey & Gillis were paid by the Factors' & Traders' Insurance Co. (for whose use this suit is brought) before this suit was brought, for the damages sustained by Jurey & Gillis by the burning of the cotton, then the plaintiffs cannot recover in this action and under the complaint in this case." The court refused to give either of these instructions.

The first assignment of error argued by the counsel for plaintiffs in error relates to the admission in evidence of the testimony of Jurey and Scott, in respect to the terms of the contract by which the railroad company undertook to transport the cotton of the defendants in error to New Orleans. The contention is that the bill of lading was the contract, and, being in writing, no parol evidence could be received to vary its stipulations. Before this rule can be applied the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract between the parties? No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing ; in either case it is equally binding. *Amer. Transp. Co. v. Moore*, 5 Mich. 368 ; *Shelton v Merchant's Dispatch T. Co.* 59 N. Y. 258 ; *Roberts v. Riley*, 15 La. Ann. 103. The defendants in error insisted that the contract between them and the railroad company was by parol ; that it was made between Jurey and the defendants in error, and by Scott for the railroad company, and denied that the bill of lading was the contract, and alleged that it had never been delivered to the defendants in error, but only to Hall, who was not authorized to make a contract for them. It is plain, upon this statement of the controversy, that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding, as detailed by the witnesses, or the bill of lading expressed the agreement of the parties. The evidence that the contract was by parol, and was not the contract expressed in the bill of lading, came from Jurey,

one of the defendants in error, and from Scott, the agent of the plaintiff in error, between whom it was made, and was not contradicted. The contention that this evidence should have been excluded, is certainly not based on any solid ground. There is nothing in this assignment of error for which the judgment should be reversed.

The next contention of the plaintiffs in error is that the court erred in instructing the jury "that the paper read in evidence by the defendant as a bill of lading contains no restriction upon the liability of the defendant as a common carrier." It is insisted that the purport of the charge is that, independent and irrespective of the parol evidence, and upon its face, the contract contains no restriction. But such is evidently not the meaning of the instruction, because the words of the bill of lading clearly import an exception to the liability of a common carrier. What the court must have meant was that, in view of the circumstances under which the bill of lading was executed, as detailed by the uncontradicted evidence of the witnesses, taken in connection with the fact that the rate of freight, which is stated to be the consideration for the exception, is left blank in the body of the bill of lading, it was not the intention of the parties to the contract that the railroad company should be exempted from any of the liabilities of a common carrier. The court was called upon to construe a paper writing. It must be conceded that the writing was open to construction. It was the right and duty of the court, in order to decide upon its meaning, to look not only to the language employed, but to the subject-matter and surrounding circumstances. *Barreda v. Silsbee*, 21 How. 161; *Nash v. Towne*, 5 Wall. 689; *Canal Co. v. Hill*, 15 Wall. 94. When, therefore, the court was required to state authoritatively to the jury the meaning of the bill of lading, it cannot be presumed that it shut its eyes to the strong light thrown on it by the facts attending its execution, or that its instruction is to be interpreted as applying only to the words of the contract. It must be presumed that the court used all proper means to ascertain the true meaning of the bill of lading, and we think its interpretation, in view of all the circumstances of the case, was the right one.

The next ground upon which the plaintiffs in error ask a reversal of the judgment is the refusal of the court to give the charges numbered 2 and 4 as requested by the plaintiff in error. The argument in support of this assignment is as follows: Section 2891 of the Code of Alabama provides: "In all cases where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party in the record." In no part of the body of the complaint is there any averment showing in what way and by what means the *Factors' & Traders' Insurance Co.* acquired an interest in this

suit or a right to bring this action in the name of the owners of the cotton for their use, or that they have any interest in the suit ; and as the evidence shows that the Factors' & Traders' Insurance Co. acquired their right to bring a suit against a carrier by having paid their insurance liability to Jurey & Gillis, which was a secondary liability, the carrier being primarily liable, the form of complaint adopted in this case was not sufficient ; that the complaint should state with certainty the facts showing the right of the insurance company to bring the action and the amount of the recovery to which they are entitled. The ground of their contention is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to prove what sum was so paid. This is an attempt to reverse the judgment of the circuit court on a question of pleading. The record in the case, in our opinion, shows that the plaintiff in error made a contract for the transportation of the cotton of the plaintiffs, with no exception of the carrier's common-law liability ; that it did not deliver the cotton, for the value of which this suit is brought ; that the cotton was destroyed while in the possession of the plaintiff in error, and was a total loss ; and that the loss has been paid to the defendants in error by the insurance company. Under these circumstances, as it plainly appears on the face of the record that the judgment of the circuit court was right, it would not be reversed for an error which could not possibly have worked any injury to the plaintiff in error. *Brobst v. Brock*, 10 Wall. 519 ; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294.

But we are of opinion that the ground upon which this assignment of error is based is not tenable, which is that the recovery must be limited to the amount paid by the insurance company to the defendants in error, and that the burden is on the insurance company to show how much it paid. Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned. The payment of a total loss by the insurer works an equitable assignment to him of the property, and all the remedies which the insured had against the carrier for the recovery of its value. *Mason v. Sainsbury*, 3 Doug. 61 ; *Yates v. Whyte*, 4 Bing. N. C. 272 ; *Clark v. Hundred of Blything*, 2 Barn. & C. 254 ; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385 ; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285.

This rule is so strictly applied that when two ships belonging to the same owner came into collision with each other, and one of them sank and became a total loss, it was held that the insurers of the lost ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault in the collision, for their right existed only through the owner of the ship insured, and not independently of him, and as he could not have sued himself they could have no remedy against him. *Simpson v. Thompson*, 3 App. Cas. 279. See, also, *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

In *Gales v. Hailman*, 11 Pa. St. 515, it was held that a shipper who has received from the insurer the part of the loss insured against, might sue the carrier on the contract of bailment, not only in his own right for the unpaid balance due himself, but as trustee for what has been paid by the insurer in ease of the carrier, and upon the trial of such a case the court will restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction.

Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of this value will give them the whole *spes recuperandi*, and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. *North of England Ins. Ass'n v. Armstrong*, L. R. 5 Q. B. 244. See, also, *Clark v. Wilson*, 103 Mass. 227.

The authorities above cited which relate to marine policies apply, as well as the other cases cited, to the question in hand, for in *Hall v. Railroad Cos.*, 13 Wall. 367, it was held that "there is no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land."

We are of opinion, therefore, that the recovery in this case might properly have been, as it was, for the entire loss sustained by the nominal plaintiffs, without regard to the amount of insurance paid. The only effect of the provision of section 2891, Code of Alabama, is to make the party for whose use the suit is brought *dominus litis*, and to give it the same rights as if it were the assignee of the cause of action. Its recovery is on the nominal plaintiff's cause of action. But as there is no formal assignment, and the suit is in the name of the nominal plaintiff, the party beneficially interested is only bound to establish the cause of action, without proof of his equitable right to the recovery.

It follows from these views that the complaint was sufficient for

the case as presented by the evidence, and that the evidence tended to sustain the case stated in the complaint.

The next ground for reversal argued by the plaintiff in error is that the circuit court erred in sustaining the demurrer to the second plea. It has already been stated that, under the Code of Alabama, where a suit is brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party to the record. In view of this provision of the statute, in a suit brought by one person for the use of another, a plea of payment which does not allege a payment to the beneficial plaintiff, or a payment to the person holding the legal title, before the person holding the beneficial interest acquired his right, is clearly bad. The plea which was adjudged insufficient makes neither of these averments, and was therefore bad. The object of the plea seems to have been to raise the question whether the payment by the insurer to the insured, for property lost while in the possession of a common carrier, discharged the liability of the common carrier. If the plea was based on any such theory, the views we have expressed show that it did not present a bar to the present action.

The last assignment of error which we shall notice is based on the charge of the court, to the effect that "the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at 8 per cent per annum from the time when the cotton ought to have been delivered." The error alleged is that the rate of interest should have been placed at 5 per cent, which is the legal rate in Louisiana, where the contract was to be performed, and not at 8 per cent, which was the legal rate in Alabama, where the contract was made.

Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was therefore ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. "The rule is that the matter of exception shall be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them." *Jacobson v. State*, 55 Ala. 151. "When an exception is reserved to a charge, which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection." *South*

& N. A. R. Co. v. Jones, 56 Ala. 507. So, in *Lincoln v. Claffin*, 7 Wall. 132, this court said: "It is possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. . . . But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. . . . It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct."

On these authorities we are of opinion that the ground of error under consideration was not well saved by the bill of exceptions. Many other grounds of error have been assigned, though not argued by counsel for the plaintiff in error. But what we have said covers most of them. The others are not well taken. We find no error in the record. The judgment of the circuit court is therefore affirmed.

Contract of Carriage—Parol Evidence.—As to the admissibility of parol evidence to vary or contradict the terms of a written contract for the transportation of goods, see *St. Louis, K. C. & N. R. Co. v. Cleary*, supra; and *Hopkins v. St. Louis & San Francisco R. Co.* and note, supra.

Carriers—Insurance Company—Subrogation.—Where goods entrusted to a common carrier have been destroyed by fire while in its custody, the insurance company which has insured them may, upon paying the loss, recover in turn the amount so paid from the carrier without proving any wrongful act on its part. *Hall & Long v. Railroad Cos.*, 13 Wall. 367; *Gates v. Hailman*, 11 Pa. St. 515.

Fires—Insurance Company—Subrogation.—The same principle holds true in case of the payment of a loss by an insurance company occasioned by a fire negligently communicated by the sparks of a railroad locomotive to property adjacent. *Hart v. Western R. R. Corp.*, 13 Metc. 99; *Peoria Marine & Fire Ins. Co. v. Frost*, 87 Ill. 338; *Bean v. Atlantic & St. L. R. Co.*, 58 Me. 82; *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399. *Swarthout v. Chicago & N. W. R. Co.*, 49 Wisc. 625; *Brighthope R. Co. v. Rogers*, 8 Am. & Eng. R. R. Cas. 710.

Form of Suit.—The payment of the loss works an equitable assignment to the insurance company of the claim against the carrier, and this should be prosecuted by the insurer as trustee or to the use of the insurance company. *Gates v. Hailman*, 11 Pa. St. 515; *Hart v. Western R. R. Corp.*, 13 Metc. 99; *Rockingham Mutual F. I. Co. v. Bosher*, 89 Me. 253; *Peoria Marine & Fire Ins. Co. v. Frost*, 87 Ill. 338; *Connecticut Mutual L. I. Co. v. N. Y. & N. H. R. Co.*, 25 Conn. 265; *Bean v. Atlantic & St. L. R. Co.*, 58 Me. 82; *Conn. F. I. Co. v. Erie R. Co.*, 73 N. Y. 399; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. C. Ct. 1. But see *Swarthout v. Chicago & N. W. R. Co.* 49 Wisc. 625.

Life Insurance—No Subrogation.—But where a railroad company has negligently caused the death of a person, an insurance company paying the amount of a policy upon the life of deceased, is held to have no claim against the railroad company. *Conn. Mutual L. I. Co. v. N. Y. & N. H. R. Co.*, 25 Conn. 265; *Insurance Co. v. Brame*, 95 U. S. 754.

CARSTAIRS

v.

MECHANICS AND TRADERS' INS. CO.

(Advance Case, United States Circuit Court, D. Maryland. June 4, 1883.)

Under an open policy of insurance on goods while in transit by railroad, it was stipulated that the insurance company should, in case of loss, be subrogated to all claims against the carrier. Certain goods covered by the policy were destroyed in a railroad collision, having been shipped under a bill of lading which provided that in case of loss, by which the railroad company incurred any liability, the railroad company should have the benefit of any insurance which might have been effected on the goods. *Held*, in an action by the insured against the insurance company, that he could not recover, having, by the bill of lading, defeated the right of subrogation against the carrier, to which the insurance company was entitled.

John H. Thomas for plaintiffs.

John S. Tyson and S. T. Wallis for defendant.

MORRIS, J.—In my judgment, one of the defenses set up in this case is fatal to the plaintiffs' right to recover, and I shall consider but that one. The suit is brought to recover from the insurance company the value of goods which were lost while in transit from Peoria to Philadelphia by railroad, in consequence of the car in which they were carried being wrecked by a collision with other cars. This was one of the risks insured against under the open policy, and the written indorsement thereon, issued by the defendant to the plaintiffs. The policy was for one year and was issued several months before these goods were shipped, and both the policy and the written indorsement thereon, expressly stipulate that the insurance company in case of loss, is to be subrogated to all claims against the transporter of the merchandise.

Now, the bill of lading under which the plaintiffs claim the goods provides that in case of loss, by which the carrier incurs any liability, the carrier shall have the full benefit of any insurance which may have been effected upon or on account of the goods. Of course, this agreement in the bill of lading is not an agreement that insurance shall be effected; but if insurance is effected, and the holder of the bill of lading gets compensation from the insurer, it would seem clear that, unless the stipulation is void, the holder of the bill of lading must be defeated, to the extent of the compensation which he has so obtained, in any action which he may bring against the carrier. If, therefore, the plaintiffs should recover in this suit compensation from the insurance company, the agreement in the bill of lading, if valid, has made it impossible for

them to do what, by both the printed and the written clauses of the policy, they agreed to do, namely, to subrogate the insurance company to their claim against the carrier. They have in effect agreed with the insurance company to subrogate it to their claim against the railroad, and have also agreed with the railroad to subrogate it to any claim they may have against the insurance company. This result can be avoided only by showing that the agreement in the bill of lading is one which the carrier is not permitted to make. And counsel for plaintiffs have strongly argued that the agreement is void, because it results in enabling the carrier to escape liability for negligence. It is not denied that a carrier may, by direct contract, insure himself against losses arising from his own negligence in the transportation of goods, and two cases have been cited in which it has been held that he may lawfully, by special agreement with the shipper, stipulate that he shall have the benefit of any insurance effected by the shipper. No case to the contrary has been brought to my attention.

In *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173 (1859), the insurer who had paid the loss, and who would have been subrogated to all the rights of the shipper of the goods against the carrier, was defeated in an action against the carrier solely and distinctly upon the ground that such an agreement in the bill of lading was valid and binding. It is contended that this decision is not an authority in courts which do not (as the New York courts do) uphold contracts made by carriers exempting them from liability for negligence. This case is, however, cited with approval in several text-books on the law of carriers, and it does not appear that it has ever been questioned.

The case of the *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, decided by Judge Dyer, in the United States circuit court for the eastern district of Wisconsin (1879), reported in *Lawson, Carr.* 382, is a very carefully considered decision of a federal court, in which the question was distinctly made under circumstances most favorable for the insurance company. It was there conceded to be law that the carrier could not stipulate for exemption from liability for negligence, and it was a fact found by the court that the loss had occurred through the negligence of the carrier, against whom the owner might have recovered. But the court held that, as the carrier could have insured himself against the peril by which the loss happened, although the negligence of his servants was the cause of it, there was no rule of law which forbade his contracting for the benefit of the insurance effected by the shipper. These two cases would have to be disregarded by any court which should permit this defendant to be subrogated to the rights of the plaintiff, and to recover against the carrier after having paid the loss claimed in this suit; and I should therefore have not only to doubt the correctness of these two decisions,—which I

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am not prepared to say I do,—but to be clearly convinced that they were wrongly decided, before I could rule that the defendant, on paying the insurance claimed, could have the benefit of that subrogation which the plaintiffs expressly agreed it should have.

The insurance company, being practically in the position of a surety (*Hall v. Railroad Cos.*, 13 Wall. 367), and having a right to the subrogation, and the plaintiffs having, by the terms of the bill of lading under which they claim the goods, defeated that right, they cannot be allowed to recover in this action.

Verdict for defendant.

See *Rintoul v. New York Central, etc., R. R. Co.*, and note, *infra*.

RINTOUL

v.

NEW YORK CENTRAL AND H. R. R. Co.

(*Advance Case, Circuit Court, S. D. New York. August 24, 1888.*)

A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants.

When a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

A clause in a bill of lading which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, is not an unreasonable and unjust exemption from liability for negligence, and may be enforced.

George W. Wingate for plaintiffs.

Frank Loomis for defendants.

SHIPMAN, J.—This is an action at law, which was tried by the court upon an agreed statement of facts, a trial by jury having been waived, by written stipulation of the parties. The facts which were agreed by the parties, and which were found by the court to be true, are as follows:

“The following facts are agreed upon for the purposes of the trial of the above-entitled action:

“(1) The plaintiffs are partners in business at Glasgow, Scotland, under the firm name of P. Rintoul & Sons, and are citizens and residents of Great Britain.

“(2) The defendants are a corporation formed pursuant to the

laws of the State of New York, and own and operate the railroads known as the New York Central Railroad and the Hudson River Railroad, together extending from the city of Buffalo to the city of New York, in said State.

"(3) That on the thirtieth day of July, 1880, the Yeager Milling Co. of St. Louis, Missouri, at said St. Louis, having previously obtained from the Merchants' Dispatch Transportation Co. a rate for the carriage of 1400 sacks of flour, the property of the plaintiffs, from St. Louis to Glasgow, and delivered said flour to one of the railroad companies, connections of the Merchants' Dispatch Transportation Co., operating a railroad eastward from St. Louis, and designated by said company, and obtained a memorandum receipt for said flour from said railroad company, surrendered said receipt to one Eugene Field, the several agent at St. Louis of the Merchants' Dispatch Transportation Co. and the Allan Line Steamship Co., and obtained from him a certain bill of lading numbered '145' (to be produced by the plaintiffs). That thereafter said milling company indorsed said bill of lading to the plaintiffs.

"(4) That the Merchants' Dispatch Transportation Co., on said thirtieth day of July, 1880, was a joint-stock association, neither owning nor operating any railroad or railroads, but engaged in the business of contracting for the carriage of goods between points on many of the railroads of the United States, and in procuring the execution by the companies owning or operating said railroads of said contracts, and having contracts with said railroad companies for the execution of contracts for the transportation of goods made by them, the said Merchants' Dispatch Transportation Co., all which facts were, at and before said thirtieth day of July, 1880, well known to the said Yeager Milling Co.

"(5) That in the course of the transportation of said flour by the connections of the said Merchants' Dispatch Transportation Co., from St. Louis eastward, the defendants, one of said connections, received said flour at Buffalo to transport the same to Albany, and there to deliver the same to the Boston & Albany R. R. Co., another of said connections, to be thence transported to East Boston.

"(6) That during the transportation of said flour by the defendants, the same, on the fourth of August, 1880, was in a car of one of defendants' trains which had stopped at Palmyra, New York, for water for the engine, when the rear of said train was run into by another train of the defendants, and the car containing said flour, and said flour, were destroyed by fire caused by such collision.

"(7) That the value of said flour was \$1016.

"(8) That prior to the destruction of said flour as aforesaid, an insurance had been effected by the plaintiffs on said flour with the Phoenix Insurance Co. of New York to the full value of said flour.

"(9) That after the destruction of said flour, and before the commencement of this action, the plaintiffs received from said

insurance company the said insurance on said flour to the full amount of the value of said flour.

“Wingate & Cullen, Plaintiffs’ Attorneys.

“Frank Loomis, Defendants’ Attorney.

“NEW YORK, April 28, 1883.”

The bill of lading contained the following terms and conditions, which are material to the case :

“That the said Merchants’ Dispatch Transportation Co., and its connections, which receives said property, shall not be liable . . . for loss or damage by wet, dirt, fire, . . . nor for loss or damage of any article or property whatever, by fire or other casualty, while in transit, . . . nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. . . .

“It is further stipulated and agreed that, in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods. . . .

“NOTICE. In accepting this bill of lading, the shipper or the agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.”

1. The fundamental principle which is applicable to the foregoing facts is stated in the conclusions of the supreme court in *Railroad Co. v. Lockwood*, 17 Wall. 357, as follows:

“First, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law ; second, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.”

The exemption in the bill of lading from the liability of the land carrier for fire or other casualty does not include exemption from liability for a casualty which was caused by the negligence or want of care of the carrier in whose custody the property was at the time of the happening of the damage.

2. The presumption from the facts which are contained in the agreed statement is that the fire and injury were caused by the negligence of the defendants, and this presumption was not rebutted.

“When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the manage-

ment use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *Scott v. Dock Co.*, 3 Hurl. & C. 596; *Transp. Co. v. Downer*, 11 Wall. 129; *Rose v. Stephens & Condit. Transp. Co.*, 11 Fed. Rep. 438. The defendant was, therefore, liable to the plaintiff for the damage occasioned by such negligence.

3. The remaining question is whether the clause in the bill of lading which provides that the carrier who is legally liable for any damage shall have the benefit of any insurance that may have been effected upon the damaged goods, shall be so construed as to give the benefit of the insurance to a carrier whose negligence caused the injury, or whether such a contract, so construed, is not an unjust and unreasonable exemption from liability for negligence.

The argument of the plaintiff is to the effect that such a contract virtually protects the carrier from liability arising from his negligence, because the owner of property in transit is compelled, as a prudent business man, to insure against the accidental injuries for which the carrier is not liable, and therefore if the contract is valid the carrier has indirectly and covertly, but securely, protected himself against the injurious consequences of his want of care by an insurance for which he did not pay, and on account of which there is no evidence of a reduction of the rates for freight. It does not seem to me that such a contract is unreasonable, because:

(1) It is not one of exemption from liability. The owner is under no obligation to insure; he is not compelled to furnish indemnity to the carrier; and, if he insures, can make a limited contract of insurance which does not cover losses through the carrier's negligence. There is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier shall be protected or be indemnified, but the contract simply is that, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier.

(2) It is not unfair to the owner. The carrier is at liberty to insure his interest in the property intrusted to his care, and the fact that he may obtain an indemnity from a third person by means of the owner's policy is not unfair to the owner, unless the obtaining such indemnity is, in reality, made compulsory upon him, because the owner "can equitably receive but one satisfaction" for the loss of his goods. *Hart v. Railroad Corp.*, 13 Metc. 99. If it was a part of the bill of lading that the owner must insure for the benefit of the carrier, such condition would be unfair.

(3) The contract is not necessarily unfair to the insurers.

At common law, the owner who has been paid in full or in part for his loss by the insurance company, may sue the carrier upon the contract of bailment, and as to so much of the amount recovered from the carrier as is in excess of a full satisfaction of the loss, the owner will be a trustee for the insurance company. It seems that

the effect of the clause in the bill of lading which is now under consideration is to provide that the owner in such circumstances is not a trustee for the insurance company, but a trustee for the carrier. If such a contract is entered into, without fraudulent concealment of the facts from the insurers, of which there is no evidence in this case, it cannot properly be considered unjust or unreasonable, because the insurance company obtains its remedy, not by virtue of a contract of its own with the carrier, but through the owner's contract, and its right depends upon or is subject to the agreement made by the owner with the carrier, which he is at liberty to make to suit his own interest, provided there is no fraudulent concealment from the insurers. They can, in view of this provision in bills of lading, modify the contract which they have heretofore customarily made with the insured, and the result will probably be that the insurers will also make provisions in their policies, by virtue of which insurance on property in transit will have a limited character.

In the absence of any contract on the subject, if the insured owner accepts payment from the insurers, they "may use the name of the assured in an action to obtain redress from the carrier, whose failure of duty caused the loss." The right rests upon "the doctrine of subrogation, dependant, not at all upon privity of contract, but worked out through the right of the creditor or owner." The suit cannot be in the name of the insurers. *Hall v. Railroad Cos.*, 13 Wall. 367; *Hart v. Railroad Corp.*, 13 Metc. 99; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Conn. Mut. Life Ins. Co. v. Railroad Co.*, 25 Conn. 265. By the contract in question the owner agrees that, as between him and the carrier, the latter, when he has paid for the loss, may have the benefit of the insurance. This contract will probably interfere with the benefit which the insurer would otherwise obtain by virtue of being subrogated to the rights of the owner, or of having an equitable assignment of the owner's interest in the policy; but the mere fact, in the absence of fraud, that the insurers may not occupy the same position which they would have had if the provision had not been inserted, is not sufficient to justify an opinion that the provision is unreasonable.

The amount of the premium and the amount received by the plaintiffs from the insurance are not given in the agreed statement. I am inclined to the opinion that the owner is only bound to account to the carrier for the net avails of the insurance, and if those avails were less than the value of the goods, a balance would still be due from the defendant. But as the finding simply says that the plaintiffs received from the insurers the full value of the flour, I cannot assume that the net avails were not a full indemnity for the loss.

The defendant is liable for the amount of the loss, deducting

the sum which the plaintiff has already received by way of indemnity, and as the entire amount of the loss has been paid, the plaintiff is entitled, under the contract, to receive nothing more.

Judgment is to be entered for the defendant.

Carrier cannot Exempt himself from Liability for Negligence.—It is well settled in the United States courts that a carrier can by special contract exempt himself from liability for all loss except that occasioned by the negligence of himself and his servants. He cannot, however, exempt himself from liability for a loss occasioned by such cause. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *New World v. King*, 16 How. 469; *Express Co. v. Kountze*, 8 Wall. 342; *Railroad Co. v. Pratt*, 22 Wall. 123; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railway Co. v. Stevens*, 95 U. S. 655.

Carrier may Contract for Benefit of Insurance.—It seems to be settled that a carrier may by special contract provide that he shall have the benefit of any insurance affected upon the goods in question. *Mercantile Mutual Ins. Co. v. Calebs et al.*, 20 N. Y. 173; *Phoenix Ins. Co. v. Erie & Western Trans. Co.*; *Lawson on Carriers*, 383; *Carstairs, McCall & Co. v. Mechanics & Traders' Ins. Co.*, *supra*.

BAKER & STRATTON

v.

LOUISVILLE AND NASHVILLE R. R. Co.

(10 *Tennessee Reports*, 304.)

Railroads are not bound as common carriers of live stock and only relieved of liability by the act of God or the public enemy. As carriers of live stock they are bound to use due and proper care, and deliver in reasonable time.

APPEAL in error from the Circuit Court of Sumner County.

Head Bros. for Baker & Stratton.

J. J. Turner for railroad company.

DEADERICK, C. J.—The plaintiffs in error brought suit against defendant to recover damages for failure to deliver in proper time at Memphis, a car load of sheep, shipped by them from Gallatin.

One of the firm testifies that they had been in the habit of shipping stock to Memphis, and that on the 23d of May, 1872, they took a lot of sheep, near two hundred, to Gallatin, in time to have shipped them that evening, and proposed to the agent at Gallatin to ship the same evening to Memphis; that witness told the agent his object was to get to Memphis on the evening of the 25th, so as to avail himself of next day's (Sunday's) market. When preparing to load that evening, witness states that Barth, the agent, told us not to ship that evening, but next morning at 9.15, and we

would go straight through, arriving in Memphis Saturday evening. Upon this advice and assurance that we would make better time and have no delay, by leaving on the morning of the 24th instead of the evening of the 23d of May, the witness says they drove their stock out of town and returned and loaded it on the train next morning at 9.15. He says Barth told him that they would make connection at Bowling Green, on the evening of that day (24th) with freight train No. 7, and also connect at Paris, and not be delayed on the road. The witness found, on arriving at Bowling Green, that train No. 7 had been discontinued for a week, and that he could not leave that place until the next morning, and he arrived at Memphis Sunday evening, too late for the market of that day—they sold their sheep next day for \$1.25 on the one hundred pounds less than they could have sold them for on Sunday, the day before. The stock was damaged to the extent of five or six pounds per head by the delay and shrinkage in weight.

From this witness' testimony it seems that his object was to arrive in Memphis Saturday night, and sell his stock on Sunday morning, which for some reason, he says, is usually the best day in the week as to prices. This is about the case as insisted on by plaintiffs.

There was evidence showing that Barth did not know that No. 7 would not go out of Bowling Green, as stated by him, and that at that point the railroad agent had the sheep turned into a lot, and watered and fed and shipped off next morning after their arrival, upon the first freight train.

The jury returned a verdict in favor of plaintiffs for \$25, and they appealed in error to this court, and insist that the charge of his Honor, the circuit judge, was erroneous, and that they are entitled to larger damages than the jury awarded them.

His Honor charged the jury, that if the defendant contracted to deliver the sheep in Memphis at a particular time, they were bound to do so, and on failure would be answerable in damages. The court further charged, that if Barth, the agent of defendant, advised plaintiffs that they had better lay over till next morning, believing at the time they would connect with a train (No. 7) for Memphis, and plaintiffs and he were both ignorant of the fact that that train would not be run next day, this would not amount to a contract for the delivery of the sheep at Memphis on the 25th of May; that defendant was bound to use due and proper diligence, and to deliver the stock in a reasonable time.

His Honor also charged the jury that the market on Sunday for the sale of cattle and sheep, is unlawful, and that defendant was not liable "to pay for any speculative price that plaintiffs' sheep would have brought on Sunday."

This was the substance of the charge, with the addition that the plaintiffs ought to have held their sheep over to Thursday, a

market day, and then sold them, and look to defendant for any difference in price between that day and the time he should have arrived, and for the keep and loss of weight by the delay.

The plaintiffs asked several instructions to the jury, which the court refused to give.

The first instruction as to the furnishing of the transportation and delivery in reasonable time, was given in the charge. It was, therefore, no error to refuse to repeat the instructions.

The plaintiffs next requested that the court should say that the defendants were common carriers, if the proof showed they transported goods, stock and produce for hire and compensation.

His Honor had instructed that the defendants, in transportation of live stock, were not bound as common carriers, and only relieved by the act of God or the public enemy—adding, they are common carriers as to passengers and goods, and as to live stock liable to die, etc., they are bound to use due and proper care and deliver in reasonable time. This suit is brought for delay in delivering the stock, and his Honor says in such case, in substance, that the defendant is not necessarily liable for delay in delivery, unless prevented by the act of God or by the public enemy. And this is in accord with the holding in 1 Cold. 271 and 6 Heis. 273-4.

Next, the court was requested to say that the change of schedule should be made known to the agents and the public. This was said in the charge as given.

The court was also requested to say that defendants were bound to furnish suitable and sufficient transportation, and that defendant is bound by the contracts made with plaintiffs by their agent, and are liable for breach of the same. Both these propositions were charged in substance and effect.

Instructions were also asked to the effect that the measure of damages in this case was, the injury to the stock, and the difference between the price realized and that at which they could have sold on Sunday morning.

We do not think that there was any error in refusing this instruction. Such, perhaps, as to the sale, if it had been shown to be the market value, would have been the rule, and if there had been a contract to deliver by a specified time, or if there had been unreasonable delay.

Lastly, the court was asked to say that a contract entered into Sunday, but not to be executed until Monday, was not illegal. It seems to have been so held by this court, 6 Lea, 288.

But the circuit judge had charged, that the facts detailed did not constitute a contract; there was, therefore, no contract to deliver the sheep on Saturday evening at Memphis, and the refusal of the court to charge as requested, did not prejudice the plaintiffs. The defendant was only bound to deliver within a reasonable time,

and there is no error for which the judgment should be reversed and it will be affirmed.

Liability of Carriers of Live Stock.—According to some authorities, carriers of live stock are held to all the ordinary responsibilities of common carriers. *Kansas & Pac. R. Co. v. Reynolds*, 8 Kans. 628; *Kimball v. Rutland & Vt. R. Co.*, 26 Vt. 247; *Kansas Pac. R. Co. v. Nichols*, 9 Kans. 285; *S. & N. Alabama R. Co. v. Hanlein*, 52 Ala. (N. S.) 606; *Smith v. New Haven & Northampton R. Co.*, 12 Allen, 531; *Evans v. Fitchburg R. Co.*, 111 Mass. 142; *Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. Pittsburg Ft. W. & C. R. Co.*, 10 Ohio St. 65; *Michigan Central R. Co. v. Myrick*, 9 Am. & Eng. R. R. Cas. 25.

Carriers of Live Stock not Held Liable as Insurers.—In other cases the carrier of live stock is not held liable as at common law in the transportation of other goods. He is not deemed an insurer. *Clark v. Rochester & S. R. Co.*, 14 N. Y. 570; *Penn v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *Conger v. Hudson River R. Co.*, 6 Duer. 375; *Michigan S. & N. Ind. R. Co. v. McDonough*, 21 Mich. 166; *Lake Shore & Mich. S. R. Co. v. Perkins*, 25 Mich. 329; *Louisville, etc., R. Co. v. Hedges*, 9 Bush 645; *Rexford v. Smith*, 52 N. H. 355.

Live Stock must be Transported and Delivered within Reasonable Time.—A carrier is bound to use all reasonable diligence in the transportation of live stock. *Illinois R. R. Co. v. Waters*, 41 Ill. 73; *Ohio & Miss. R. Co. v. Dunbar*, 20 Ill. 623; *Tucker v. Pacific R. Co.*, 50 Mo. 385; *Michigan S. & N. R. Co. v. McDonough*, 21 Mich. 165; *Phila. W. & B. R. Co. v. Lehman*, 6 Am. & Eng. R. R. Cas. 194.

CANFIELD et al.

v.

BALTIMORE AND OHIO R. R. Co.

(93 *New York Reports*, 532.)

A common carrier is bound to exercise reasonable care and prudence in the transportation of property, and is liable for loss resulting from a failure in this respect, although by his contract the transportation is "at the owner's risk."

Where the fact of injury is established, and negligence on the part of the carrier is shown, to which, as a cause, the injury can reasonably be imputed, the question as to whether it was so occasioned is one of fact for the jury.

The failure of the carrier to deliver the property or any portion thereof to the consignee on demand at the place of destination is *prima facie* evidence of negligence, which, in the absence of any evidence excusing the non-delivery, presents a question of fact for the jury.

Plaintiffs shipped under such a contract by defendant's road at W. eighteen boxes of jewelry to be transported to N. Y. The evidence tended to show that, owing to inefficient facilities or accumulation of freight, from three to six days more than the usual time was taken in the transportation. Also that before delivery to the consignee, and while the boxes were in the possession of the defendant, one of them was opened and a portion of its contents abstracted. The court charged the jury that they could not find a verdict for the plaintiffs except upon the assumption that the property had

been stolen or lost while in the defendant's possession, and that such loss must be found to be attributable exclusively to the negligence of defendant in delaying transportation. *Held*, error.

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made December 5, 1881, which affirmed a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the value of a quantity of jewelry, part of the contents of one of eighteen boxes delivered by plaintiffs to defendant for transportation from Washington to New York, which jewelry, plaintiffs alleged, was through defendant's negligence abstracted from the box while in its custody.

In the bill of lading, opposite to the description of the packages, was written the words "owner's risk."

The case is reported on a former appeal in 75 N. Y. 144.

The material facts are stated in the opinion.

Benj. Estes for appellants. Unless the bill of lading was delivered and accepted before shipment of the goods, plaintiff's rights are not affected by any conditions contained therein. *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 716. The most favorable charge that the defendant was entitled to on the evidence, in any event, was that it was a question of fact whether the goods were shipped under that bill of lading. *Justice v. Lang*, 52 N. Y. 327, 328, 329. The fact that the goods were never delivered to the consignees, having been proved, is evidence of negligence, and negligence will be presumed from such proof. *Westcott v. Fargo*, 6 Lans. 319; *Magnin v. Dinsmore*, 56 N. Y. 168; 70 id. 417; *Burnell v. N. Y. C. & H. R. R. Co.*, 45 id. 185; *Newstadt v. Adams*, 5 Duer, 43; *Steers v. L., N. Y. & P. Steamship Co.*, 57 N. Y. 1, 6; *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 id. 11; *Curtis v. D., L. & W. R. R. Co.*, 74 id. 124; *Beardsley v. Richardson*, 11 Wend. 25; *Arent v. Squier*, 1 Daly, 347; *Earl v. Cadmus*, 2 id. 237; *Schwerin v. McKie*, 5 Robt. 404. Common carriers, or even warehousemen, are bound to deliver goods intrusted to them on demand, and on failure to do so must be regarded as having converted the same, unless they prove that they were lost without their fault, and that they exercised ordinary care in keeping the same. *B'k of Oswego v. Doyle*, 16 W'kly Dig. 308; *Boies v. H. & N. H. R. R. Co.*, 37 Conn. 272; *Funkhouser v. Wagner*, 62 Ill. 59; *Logan v. Mathews*, Penn. St. 417; *Lewis v. Smith*, 107 Mass. 334; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Claffin v. Meyer*, 43 N. Y. Supr. 7; *McGuire v. Tyler*, 8 Wall. 650; *Bush v. Miller*, 13 Barb. 481; *Wharton on Neg.* § 422. *Merch's' B'k v. Rowls*, 7 Ga. 191. The same presumption of negligence arises when a common carrier fails to deliver a part of the goods as on a total failure. *Edwards on Bailments*, §§ 671, 672; *Hawkes v. Smith*, 1 C. & M. 72; *Brintner v. Saratoga R.* 32 Vt. 665; *Ellis*

v. Willard, 9 N. Y. 529. Proof of delay is proof of negligence. *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712, 717; *Acheson v. N. Y. C. & H. R. R. Co.*, 61 id. 652; 30 id. 564; id. 630. The plaintiffs were not required to point out the precise act or omission in which the negligence consists. *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 127. A common carrier must prove a positive agreement to exempt itself from the common law liability, and no presumption will be indulged exempting them from such liability. *Edsall v. C. & A. R. & T. Co.*, 50 N. Y. 661; *Bostwick v. B. & O. R. R. Co.*, 45 id. 712; *Blossom v. Dodd*, 43 id. 264, 270; *Kirkland v. Dinsmore*, 63 id. 171, 179; *Mynard v. S. B. & N. Y. R. R.*, 71 id. 181, 185; *Westcott v. Fargo*, 6 Lans. 183; a. c., 61 N. Y. 542. Plaintiffs having proved enough to authorize the jury in finding that the goods were lost while in the defendant's possession through its negligence, it was called upon to prove proper care or absence of negligence on its part, or, at least, to account for the missing goods. *Alexander v. Green*, 7 Hill, 533, 574; *Russell Mfg. Co. v. N. H. Steamboat Co.*, 50 N. Y. 127; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184, 190; *Schwerin v. McKie*, 5 Robt. 404; *Pratt v. Hibbard*, 7 Cow. 497, 500; *Brooks v. Steen*, 6 Hun. 516; *Wylde v. N. R. R. Co. of N. J.*, 53 N. Y. 156, 164; *Mynard v. S. R. R. Co.*, 71 id. 183; *Bruce v. Kelly*, 7 J. & S. 27, 36; *Bush v. Miller*, 13 Barb. 481; *Nelson v. Woodruff*, 1 Blackf. 156, 160. No presumptions will be indulged in favor of common carriers, exempting them from common-law liability. *Edsall v. C. & A. Co.*, 50 N. Y. 661; *Westcott v. Fargo*, 6 Lans. 328; *Mynard v. S. R. R.*, 71 N. Y. 183; *Nichols v. N. Y. C. & H. R. R. Co.*, 89 id. 370; *Wells v. St. Nav. Co.*, 8 id. 375, 380; *Alexander v. Green*, 7 Hill, 533, 547; *Shumway v. Erie R. R. Co.*, 43 N. Y. 123.

Austen G. Fox for respondent. If plaintiffs had intended to claim at the trial that the bill of lading was not the contract, they should have made their objection when it was offered in evidence. 75 N. Y. 144; *Thayer v. Marsh*, id. 340, 342; *White v. Dodds*, 42 Barb. 554, 564; *Perratt v. Shearer*, 17 Mich. 48, 53; *Abbott v. Parsons*, 17 Bing. 563. In the absence of evidence to the contrary, the presumption is that the delivery of the bill of lading and the receipt of the boxes mentioned were simultaneous, or nearly so. *Hill v. S. B. & N. Y. R. R. Co.*, 75 N. Y. 351; *Ger. F. Ins. Co. v. M. & C. R. R. Co.*, 72 id. 90, 94; *Bostwick v. B. & O. R. R. Co.*, 45 id. 712; *Merch's' N. Bk. v. Hall*, 83 id. 338; *Eaton C. & B. Co. v. Avery*, id. 31. Whatever the presumption may be in the absence of evidence, it would have been error to submit to the jury the question of the delivery of the bill of lading, the evidence of its delivery being uncontradicted, and neither incredible nor improbable on its face. *Loomer v. Meeker*, 25 N. Y. 361; *Newton v. Pope*, 1 Cow. 109; *People v. Cooke*, 8 N. Y. 67, 73. The court did not err

in instructing the jury that "the action is practically under the bill of lading, that is, the rights of the parties are determined by the nature of the contract made by the bill of lading. *Brotherson v. Jones*, Lalor's Suppl. 171; *Evans v. Spillman*, 6 B. Monr. 334; *Hilliard on New Trials* (2d Ed.), 60; *Graff v. P. & S. R. R. Co.*, 31 Penn. St. 489; *Storey v. Brennan*, 15 N. Y. 524; *Alger v. Gardiner*, 54 id. 360. The burden of proof was on the plaintiffs to prove negligence. *French v. B., N. Y. & E. R. R. Co.*, 4 Keyes, 108; 46 N. Y. 279; *Moore v. Evans*, 14 Barb. 524; *N. J. S. Nav. v. Merch's' B'k*, 6 How (U. S.), 344, 383, 384; *Carr v. L. & Y. Ry. Co.*, 7 Ex. 607. The plaintiffs were bound to prove that the alleged negligence was the cause of the loss. *Kroushage v. C., M. & St. P. R. R. Co.*, 25 Wis. 500; *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413, 419; *Wharton on Neg.*, § 73; 2 Greenl. Ev. § 256; *Holbrook v. U. & S. R. R. Co.*, 12 N. Y. 236; *Alden v. B. C. R. & N. R. R. Co.*, 57 Iowa, 623, 629; *Caldwell v. N. J. St. Co.*, 47 N. Y. 282. The court did not err in confining the jury to a consideration of negligence by delay. *French v. B. N. Y. & E. R. Co.*, 4 Keyes, 108; *Clafin v. Meyer*, 75 N. Y. 260. The court did not err in charging that "under the burden of proof the plaintiffs are bound to negative every opportunity of their (the goods) being stolen which the facts admit of." 75 N. Y. 144; *Pattison v. S. N. B'k*, 80 id. 82; *M. H. & O. R. v. Kirkwood*, 45 Mich. 51; *Powell v. Price*, 3 N. Y. 322.

RUGER, Ch. J.—When this case was before this court on a former appeal (75 N. Y. 144) it did not affirmatively appear that for the period of three days, elapsing between the time of the delivery to the consignees by the carrier of the boxes originally containing the lost goods, and the discovery of the loss of the property contained in them that such care had been proved by the plaintiffs to have been taken of them during that period, as to exclude the possibility of the loss having occurred after the goods had arrived in the possession of the consignees, and, therefore, that no stronger presumption of their loss while in the possession of the defendant could be indulged in by the jury than that such loss occurred while they were in the possession of the consignees. For this reason the judgment upon the verdict in favor of the plaintiffs was reversed and a new trial ordered.

This proof has now been supplied, and that question is therefore eliminated from the case. The case is now presented as arising upon a contract between the consignors and the carriers for the transportation of certain goods from Washington to New York at the owner's risk, and their safe delivery to the consignees at the latter place.

Assuming, for the purposes of the argument, that this contract of carriage is embraced in the bill of lading, and that that was

R. Co., 5 Sandf. 180; Guillaume v. Hamburg Packet Co., 42 N. Y. 212; Edsall v. Camden & Amboy R. Co., 50 N. Y. 661; French v. Buffalo, etc., R. Co., 4 Keyes, 108; Knell v. United States, etc., Steamship Co., 23 N. Y. Superior Ct. 423; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Nicholas v. N. Y. Central, etc., R. Co., 9 Am. & Eng. R. R. Cas. 103; McKinney v. Jewett, 9 Am. & Eng. R. R. Cas. 209. Baltimore, etc., R. Co. v. Skeels, 3 W. Va. 556; Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87.

Burden of Proof.—Where a carrier fails to deliver to the consignee goods entrusted to his charge, a presumption of negligence arises which it is for him to rebut. American Express Co. v. Sands, 55 Penna. St. 140; Murphy v. Staton, 3 Munf. 239; Riley v. Horn, 5 Bing. 217; Clark v. Spence, 10 Watts, 835; Colt v. M'Mechen, 6 Johns, 160. See Farnham v. Camden & Amboy R. Co., 55 Pa. St. 53.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. Co.

v.

SIMPSON.

(*Advances Case, Kansas. 1883.*)

A common carrier may relieve himself from the strict liability imposed on him by the common law by a special contract, but he cannot contract for exemption from the consequences of his own or his agent's negligence.

Where a horse was shipped by rail and the bill of lading was signed by the carrier and the agent of the shipper, and provided, among other things, "value not to exceed \$100," which was inserted in the bill of lading by the carrier, and through the carrier's negligence the horse was injured, *held*, in an action by the shipper for damages, that his recovery was not limited by the words "value not to exceed \$100."

ACTION by Richard D. Simpson against the Kansas City, St. Joseph and Council Bluffs R. R. Co., to recover \$300 for damages alleged to have been sustained on account of injuries to a horse shipped from East Atchison to St. Joseph, Mo. The defendant, in his answer, among other things averred that it was induced to and agreed to carry and deliver the horse at the rate and price of \$4 only, by reason of a contract that its risk, in case of damage thereto, should not exceed \$100, and that in no case would a breach of its said contract make its liability exceed that sum. The following is a copy of the contract:

LIVE STOCK.

EXTRACT FROM FREIGHT TARIFF.

At these rates the owner is to feed, water, and take care of his stock at his own expense and risk, and is to assume all risk of injury or damage that the animals may do themselves or to each other or which may arise from any delay of trains; stock will only be taken by the car load at the price fixed under "special tariff"

when a contract is executed by the station agent and shipper, to be loaded and unloaded, watered and fed by the owner, at his risk in all respects, except as specified in form of contract or receipt below. Two cars will entitle owner or one driver to pass on the train with the stock to take care of it. From three to seven cars will entitle two men in charge to pass on the stock train, which is the maximum number that will be passed on any train from one consignor or party, and at their own risk of personal injury from any cause whatever.

“ ORIGINAL.”

The agent at the station where the stock is loaded will give no passes, but must enter on the back of the contract the name or names of the persons who actually accompany the stock, which is the authority of the conductor to pass them. Return passes will be given at the option of the company only.

Live stock in quantities less than a car load will be rated as follows :

One horse or mule, 2000 pounds.

Non-enumerated live stock of all kinds not shipped under contract will be charged first-class rates, actual weight, not less than fifty cents each. Attention of shippers is especially directed to the fact that agents of this company are not authorized to make arrangements for forwarding live stock to be delivered at destination at a specified time. Due diligence will be observed in sending the same forward.

“ CONTRACT.”

No. car, 742. Freight Office, Kansas City, St. Joseph & Council Bluffs R. R. Co., E. Atchison Station, September 3, 1881.—Received of William Towne, one horse, to be delivered at St. Joe station, at special rates, being, \$— per car, back charges \$—, in consideration of which, and for other valuable consideration, it is hereby mutually agreed that the said company shall not be liable for loss by jumping from the cars, delay of trains from any cause or any damage said property may sustain except such as may result from a collision of the train, or when cars are thrown from the track in the course of transportation. Nor will this company be responsible in any case for any loss or damage which may arise after said stock or property is delivered at the point on its line where it is consigned by this contract or when it is to be turned over to any other company or boat for further transportation to its destination.

Value not to exceed \$100.

To be fed and watered and taken care of by the owner. P. Paid,
 \$4. (Signed) D. BRISBOIS, Quad.
 WM. TOWNE.

Which contract is endorsed as follows: Kansas City, St. Joseph & Council Bluffs line, stock contract with Wm. Towne, September 3d, 1881. Not transferrable. "D. BRISBOIS, East Atchison."

Trial was had before the court and jury, at the February term for 1882. The charge to the jury, by Martin, J., was as follows:

1. This is an action to recover \$300 for damages alleged to have been sustained on account of injuries to a horse, which was transported by defendant from East Atchison to St. Joseph, Missouri, over the line of its railroad on or about the 3d of September, 1881.

2. The horse was transported by the defendant under a special written contract of date September 3d, 1881, entered into between the defendant and one William Towne. It does not appear from the contract, a copy of which is set forth in defendant's answer, that said William Towne was acting as agent for the plaintiff, nor for any other person. But if you find from the evidence that at the time of entering into said special contract the plaintiff, Richard D. Simpson, was the owner of said horse, and that William Towne was agent of the plaintiff, for the purpose of securing transportation and acted as such agent, then the plaintiff will have the same rights under the said contract as if it had been entered into with him and in his name.

3. A railroad company engaged in the business of transporting live stock assumes all the responsibilities of a common carrier. In the absence of any special contract binding its liability, it insures against all loss except that caused by the act of God or of the public enemy. It may limit its liability by special contract with the shipper, or consignor of the property, but such special contract can never relieve the railroad company from liability from its own negligence.

4. The special contract in this case contains the following clause: "Said company shall not be liable for loss by jumping from the cars, delay of trains from any cause, or any damage said property may sustain, except such as may result from a collision of the train or when cars are thrown from the track in the course of transportation." It will be observed that this special contract purports to limit the liability of the railroad company for injury to the property transported of two classes of perils, namely, "collision of trains and being thrown from the track." But notwithstanding this contract, if the horse was injured by the negligence of the railroad company, or want of ordinary care on its part, then it would still be liable to the proper party for the injury, although such negligence did not result in "collision of trains," nor "in being thrown from the track." In such case, however, the burden of proving such negligence is on the shipper, and it devolves upon him to prove such negligence by a preponderance of the evidence.

5. Under the pleadings in this case, before the plaintiff is entitled to recover, you must be satisfied by a preponderance of the

evidence of the existence of each and all the following facts, to wit :

1. That the plaintiff was the owner of the said horse at the time of the transportation from East Atchison to St. Joseph, by the defendant.

2. That said horse was injured during said transportation.

3. That such injury to said horse was caused by the negligence of the defendant, or its failure to exercise ordinary care. Ordinary care is that degree of care which men of ordinary prudence usually exercise under like circumstances.

6. If you find the existence of each and all of the three foregoing facts, then the plaintiff will be entitled to recover, otherwise not.

7. If you find that the plaintiff is entitled to recover, then the next question for your consideration will be to determine the amount of such recovery. Where property is injured by a common carrier, by reason of the negligence of the carrier, the rule of damages is, the difference between the value of the property as delivered at the time and place of delivery and the value at the same place at the time and in the condition that such property should have been delivered. And this will be the rule, notwithstanding the fact that the shipping contract may contain a clause stating that the value of the property does not exceed a certain sum. But in the present case the damages cannot in any event exceed the sum of \$300, which is the amount claimed in the petition.

8. You are exclusive judges of all the questions of fact, and of the weight of the evidence and of the credibility of the witnesses.

9. Two forms of verdict will be presented to you; one suitable for finding for the plaintiff, and for assessing the amount of his recovery, and the other suitable for finding in favor of the defendant.

After you have heard the argument of counsel, take the case and do justice between the parties, under the law and the evidence.

The jury returned a verdict for the plaintiff and assessed the amount of his recovery at the sum of \$250.

Judgment was entered thereon. The company now brings the case here.

Strong and Musman for plaintiff in error.

Smith and Solomon for defendant in error.

HORTON, C. J.—It is contended on the part of plaintiff in error that as the horse was transported by the railroad company under a special written contract entered into between the company and one William Towne, that Towne was the only person authorized to sue for a breach thereof, and that the plaintiff could not recover. Notwithstanding the fact that the railroad company contracted

with Towne alone, and had no knowledge that Towne was acting merely as agent of Simpson, Simpson was, in fact, "the real party in interest" and could maintain an action for any loss sustained by him under the contract.

It is well settled in this State that where a contract is made by an agent for the benefit of his principal, the principal may sue on the contract, and this is so, even where the contract is made in the name of the agent and the principal's name is not disclosed. *Railway Co. v. Thatcher*, 13 Kas. 566; *Pomeroy on Remedies and Rights*, 170.

The trial court instructed the jury substantially that if the horse was injured by the negligence of the railroad company, the owner thereof was not limited in his recovery by the words "value not to exceed \$100," expressed in the contract. To this direction the plaintiff in error excepted and alleges that the contract was supported by good consideration, which to the carrier consisted in the diminution of risk assumed by him, and to the shipper in the reduced rate at which the service was to be performed in consequence of the risk assumed by himself as to the measure of damage in case of loss or injury. Several of the decisions cited sustain this proposition, but we are not disposed to follow their lead. It was stated in *Kallman v. Express Co.*, 3 Kas. 205, that it is only when carriers act in good faith and use due care and diligence in and about their business that the law permits them to have the benefit of limitations restricting the measure of damages in case of loss of property entrusted to them. In the late case of *Railroad Co. v. Lockwood*, the Supreme Court of the United States, after the most exhaustive examination of American and English authorities, laid down the principle that a common carrier, whether of goods or passengers, cannot stipulate for exemption from responsibility for the negligence of himself or his servants. In support of this principle, the learned justice delivering the opinion said, "If the customer had any real freedom of choice; if he had a reasonable and practicable alternative, and if the employment of a carrier were not a public one charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair and no concern of the public; but the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations whose position in the body politic enables them to control it. They do, in fact, control it and make such conditions on the travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by the common carrier ought not to be adverse, to say the least, to the dictates

of public policy and morality. The statute and relative position of the parties render any such conditions void.

* * * * *

“Conceding, therefore, that special contracts made by a common carrier with their customers, limiting their liability, are good and valid so far as they are just and reasonable, to the extent, for example, of excusing them for all loss happening by accident without any negligence or fraud on their part; when they ask to go still further and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such stipulation, but the contrary.”

In Missouri, where the bill of lading or contract was signed, the law is, that while a common carrier may limit his liability by contract, he cannot exempt himself from that responsibility which every bailee assumes for ordinary care and common honesty. *Lawson on Carriers*, Sec. 50.

In *Levering v. Union Trans., etc., Co.*, 42 Mo. 88, it is said, “The argument in favor of the right of the carrier to vary his liability by introducing conditions into his acceptance is founded on a misconception in considering that his liability is voluntary and arises *ex contractu*. The law attaches the responsibility to his employment or calling, and if he assumes that calling he has no power over the duties which the law annexes to his calling. His assuming the character of a common carrier depends entirely on his own will or assent; but if he undertakes that occupation, the liabilities which come upon him in respect to goods brought or borne to him to be carried, are imposed by law and not created by assent or agreement.”

James, J., used the following language in an unreported case of the Supreme Court of the District of Columbia: “The principle of law which, for considerations of public welfare, forbids a common carrier to bargain in particular cases for complete exemption from responsibility for a violation of his duties, forbids him to impair his obligations to the community by bargaining in particular cases for an exemption from a considerable part of that responsibility. The ground on which the rule is based, that even the shipper’s perfect consent cannot relieve the carrier, is that the object which he undertakes to regulate by contract is not his own, but a public right. . . . The principle of the rule is that any agreement which operates to interfere with a public right, touching the character and good faith of common carriers, is an agreement against public policy and welfare and is therefore void; and as an agreement that his negligence shall be cheap, must operate in this way, it necessarily falls within that principle.” *Galt v. Express Co.*, S. C. D. C. *Mss.* *Lawson on Carriers*, 434–435. See, also, *Goggin v. Railroad Co.*, 12 Kas. 416; *Railroad Co. v. Caldwell*,

8 Kas. 244; Railroad Co. v. Reynolds, 8 Kas. 623; Kallman v. Express Co., supra; Railroad Co. v. Nichols, 9 Kas. 225; Railroad Co. v. Piper, 13 Kas. 505; Railroad Co. v. Maris, 16 Kas. 333; The Emily v. Carney, 5 Kas. 685; Railroad Co. v. Peavey, 29 Kas. 169.

While the provision in a bill of lading or contract between the shipper and carrier, that the latter will not be liable beyond a certain sum expressed in the contract, may be valid to limit the liability of the carrier as an insurer, a condition of this character which seeks to cover the negligence of the carrier is void; therefore, the direction of the trial court was not erroneous. The present case furnishes a strong illustration of the oppression and injustice of a contrary doctrine. Simpson, the owner of the horse, sent his rider, Towne, a young boy, to ship the horse to St. Joseph, Mo., and enter him in the races there. He did not authorize him to fix any limitation on the value, in transporting him, and the horse was worth more than \$300. The agent of the company shipping the animal supposed the horse was fancy stock, or a race-horse, and without any inquiry as to its actual value, arbitrarily inserted in the bill of lading "value not to exceed \$100." Towne told the agent that he did not want the contract limited, but afterward signed it with the clause inserted. According to the testimony of the agent, the rules of the company required him to insert this clause in transporting fine stock, whether the shipper wanted it or not. At St. Joseph the car containing the horse was run up into the yard of the company, a flying switch made, and the car run about 200 yards without any brakeman or other person on the car to stop or control it, at such a speed that the horse was knocked down upon his knees and injured.

The other questions submitted have been fully examined, but we do not think it necessary to comment thereon, as it is clearly shown from the evidence that the agent knew that the horse was going to the fair at St. Joseph, and considered it more valuable than ordinary stock at the time of giving the bill of lading.

The judgment of the district court must be affirmed.

Limitation of Amount of Liability Does Not Apply in Case of Negligence.—Common carriers cannot by specifying in a special contract that they shall not be liable, in the event of the loss of the goods carried, beyond a certain amount, protect themselves from liability for the total value where the loss is occasioned by their negligence. *Westcott v. Fargo*, 63 Barb. 349; s. c. 61 N. Y. 542; *Orndoff v. Adams Express Co.*, 3 Bush. 194; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486; *American Express Co. v. Sands*, 55 Pa. St. 140; *United States Express Co. v. Barkman*, 28 Ohio St. 144; *Adams Express Co. v. Stettaners*, 61 Ill. 184; *Lamb v. Camden & Amboy R. Co.*, 46 N. Y. 271; *Michigan, etc., R. Co. v. Heaton*, 37 Ind. 448; *Judson v. Western R. Co.*, 6 Allen, 485; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Harvey v. Terre Haute, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 293. But see *Hart v. Penna. R. R. Co.*, 7 Fed. Rep. 680.

HALL Executor

v.

THE PENNSYLVANIA CO.

(90 *Indiana Reports*, 459.)

Where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common-law duty of such carrier, if the evidence show that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal, and the plaintiff cannot recover.

FROM the Superior Court of Allen County.

A. A. Chaplin, W. H. Coombs, R. C. Bell, and S. L. Morris for appellant.

J. Brackenridge and J. R. Carey for appellee.

Howk, J.—In this case the appellant, executor of George Glatte, deceased, the plaintiff below, alleged, in substance, in his complaint, that the appellee, on the 16th day of July, 1877, and long prior thereto, was a common carrier of goods, to carry for hire the goods of all persons, upon request, from Philadelphia, Pennsylvania, to Kendallville, Indiana; that on said day the appellant's testate delivered to the appellee, as such carrier, in good order, fifteen barrels of sugar, the goods of such decedent, to be carried by appellee safely from Philadelphia to Kendallville, then and there to be delivered to the said George Glatte, then in life; that appellee then and there received said goods to be safely carried and delivered as aforesaid, for a reasonable reward to be paid therefor by the said Glatte; that appellee failed and neglected safely to carry and deliver said goods to said Glatte, in his lifetime, nor, since his death, had appellee delivered the same to appellant, but that the same had been wholly lost, for want of due care and preservation by appellee, to the damage of the appellant in the sum of \$500, for which he, as executor, demanded judgment.

The cause was tried by the court, and a finding was made for the appellee, the defendant below, and over the appellant's motion for a new trial, the court rendered judgment against him for the appellee's costs.

In this court the only error assigned by the appellant is the overruling of his motion for a new trial; and the causes assigned for such new trial were, that the finding of the court was not sustained by the evidence, and that it was contrary to law. The single question for decision in this case, therefore, may be thus

stated: Is there legal evidence in the record of this cause which tends to sustain the finding of the trial court on every material point?

The cause was submitted to the court for trial, on an agreed statement of facts, in substance, as follows:

"It was agreed by the parties that the sugar mentioned in the complaint was, at the time the same was received by the defendant for carriage, as stated in the complaint, of the value of \$400. And thereupon the following agreed statement of facts was also submitted by the parties as evidence in said case, to wit: Come now the parties, plaintiff and defendant, and hereby agree that the following are all the facts in this case, and that the same shall be submitted to this court for decision and judgment, upon the facts herein below set forth, to wit:

"The goods described in the complaint, being fifteen barrels of sugar, were purchased by the decedent in the city of Philadelphia, in the month of July, 1877. The defendant is and was at the time this cause of action accrued a common carrier, operating the Pittsburgh, Fort Wayne, and Chicago Ry., extending through Allen county, Indiana, and also the 'National Line' of freight cars, which, among other places, ran between the city of Philadelphia and the village of Kendallville, Indiana. On the 16th day of July, 1877, the sugar so purchased was delivered in good order to the defendant, as such common carrier, at the city of Philadelphia, and a contract, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this agreed statement of facts, was made and entered into by and between the decedent and the defendant, wherein the defendant, upon the conditions therein named, agreed for a reasonable consideration to carry such sugar from the city of Philadelphia to the village of Kendallville.

"The sugar so received under said contract was by defendant, in the due course of transportation, safely and without delay carried as far as the Pennsylvania company's yard in the city of Pittsburgh, county of Allegheny, State of Pennsylvania. While there, and before there was any negligent delay on defendant's part, the property, with a large amount of other goods, then and there in the custody of the defendant, was violently taken possession of by a riotous mob, composed of persons, some of whom had until then been employees of the defendant and were such employees, unless, by their conduct, they ceased to be such. Defendant used all means in its power to retain and then to regain possession of said property, that it might preserve it, and continue its transportation, and to this end used not only such of its employees as remained in its employment, but through the proper legal authorities invoked the aid of the city of Pittsburgh and of the State of Pennsylvania, and even the presence and efforts of a large force of police furnished by the city, and of armed militia sent by the

Governor of the State, were insufficient to protect such property, and it was destroyed by fire lighted by the mob on the 21st day of July, 1877.

"It is further agreed that the defendant was fully provided with all the facilities necessary to the prompt carriage of its freights and transaction of its business, and that the sugar was taken from its control and retained by a force it could not resist. The mob was occasioned by a strike among the defendant's employees, who had been joined by a large number of persons sympathizing with the strikers."

This agreed statement of facts was signed by the attorneys of the respective parties.

The material parts of the contract, or bill of lading, marked "Exhibit A," and made a part of the agreed statement of facts, were in substance as follows:

"National Line. Fast freight line, via Pennsylvania R. R.

"Freight shipped by the National Line reaches all points west, northwest and southwest, via the Pennsylvania R. R. and its connections. Its transporting facilities are ample and unsurpassed by any other fast freight or despatch line. The cars of this line are constructed to run through from Philadelphia to the west and northwest, without transfer. All claims promptly adjusted by the agents."

(Here follow the names of the officers and of a long list of agents.)

"Received, Philadelphia, July 16th, 1877, of Harrison, H. & Co., the following packages (contents unknown), in apparent good order. Marks: G. C. G., Kendallville, Ind., G. C. Glatte, fifteen bbls. sugar, to be transported by the National Line, and the steamboats, railroad companies and forwarding lines with which it connects, to——, within —— days (Sundays and days of shipment and delivery excepted), upon the following conditions:

"That the said National Line and the steamboats, railroad companies and forwarding lines with which it connects and which receive said property, shall not be liable for any loss or damage, however accruing, enumerated below, viz.: . . . nor for loss or damage on any article of property whatever, by fire or other casualty, while in transit or while in depots or places of trans-shipment, or at depots or landings at points of delivery. . . . In witness whereof," etc.

This was all the evidence given in the cause, and upon this evidence the trial court found for the appellee, the defendant below. We are of opinion that the finding of the court was clearly right. It will be observed that in his complaint, the substance of which we have given, the appellant counted exclusively upon an implied contract or agreement of the appellee, as a common carrier, and sought to recover damages for an alleged breach of its common-law

duty as such carrier, in the transportation of his decedent's sugar. No reference whatever was made by the appellant in his complaint to any written contract or bill of lading executed by the appellee to the decedent in his lifetime, for the carriage and delivery of his sugar. In *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518, this court held that a suit against a carrier for a breach of his contract as such, under the code, must be brought upon the bill of lading, where such a bill is given and embraces the terms of the contract. The court said: "Here there was a bill of lading, embracing all the terms of a contract touching the subject-matter involved—a contract, by the written terms of which the parties were bound, and their rights and liabilities to be determined—a contract of a high and fixed character, which could not, as we have seen, be varied by parol evidence; and we are clear that it should have been referred to in, and filed with, the complaint. As this case stood, if the fact of the written contract had been disclosed, it would seem that parol evidence must have been excluded, because of the written, and the written, because not sued on."

So, in *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339, it was held that where, in an action against a common carrier to recover damages for delay in the transportation and delivery of livestock, the complaint is based upon a special contract, the plaintiff could not recover upon an implied contract to carry in a reasonable time, or for a breach of the legal duty of the defendant as a common carrier. "In other words," the court said, "there is a fatal variance in this case between the contract alleged and the case which the jury found to have been proved."

So, also, in *Lake Shore, etc., Ry. Co. v. Bennett*, 89 Ind. 457; a. c., 6 Am. & Eng. R. R. Cas. 391, where, in the first paragraph of his complaint the appellee counted exclusively upon an implied contract of the appellant, as a common carrier, and sought to recover damages for an alleged breach of its legal duty, as such carrier, in the transportation of his cattle, and the evidence showed that the cattle were received and carried by the appellant under a special contract, this court held, that there could be no recovery by the appellee on the first paragraph of his complaint. The court said: "When, therefore, the court found, as it did, that appellee's cattle were delivered to and received by the appellant under a special contract, which was at the time duly executed by the parties, it would seem that such finding would be an end of the case, as stated in the first paragraph of the complaint, and that no recovery could be had thereon. . . . The appellee could only recover, if he recovered at all, upon and in accordance with the allegations of his complaint; and as the facts specially found by the court present an entirely different case from that stated by the appellee, in either paragraph of his complaint, we think that the court, as a conclusion

of law upon its findings of fact, ought to have found for the appellant, the defendant below."

And so we think in the case at bar. When the evidence showed, as it did, that the decedent's sugar was delivered to and received by the appellee for transportation and delivery, under the terms of a special contract, there could be no recovery by the appellant in this action, because the special contract was not sued on, and because of the fatal variance between the case made by the allegations of the complaint and the case made by the evidence. Nor will it obviate this difficulty to say that, by the agreed statement of facts, the parties submitted to the court for trial a different case from the case stated in appellant's complaint; for, in that view of the case before us, it would be an agreed case, under the provisions of section 386 of the civil code of 1852, or section 553, R. S. 1881. "In an agreed case, no motion for a new trial is necessary, but the party aggrieved must except to the decision of the trial court, upon the agreed statement of facts, and unless the record shows that an exception was taken to the decision at the proper time, it will present no question for the decision of this court. This point is settled by the decisions of this court. *Fisher v. Purdue*, 48 Ind. 323; *Manchester v. Dodge*, 57 Ind. 584." *Lofton v. Moore*, 83 Ind. 112.

In this case the appellant did not except at the time to the finding or decision of the trial court upon the agreed statement of facts. In any view of the case, therefore, we are of opinion that there is no error in the record of this cause which would authorize the reversal of the judgment below.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

Pleading in Suit on Special Contract of Transportation.—Where there is a special contract of transportation the Indiana authorities are to the effect that this must be specially declared on. *Indianapolis, etc., R. R. Co. v. Remmy*, 18 Ind. 518; *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 399; *Lake Shore, etc., R. R. Co. v. Bennett*, 89 Ind. 457; s. c., 6 Am. & Eng. R. R. Cas. 891.

At any rate the exceptions from liability embraced in the special contract must be set out. *Ferguson v. Cappeau*, 6 H. & J. 394; *Fairchild v. Slocum*, 19 Wend. 329. But see *Tuggle v. St. Louis, K. C. & N. R. Co.*, 62 Mo. 425.

An action will lie in tort for non-delivery without declaring specially on the contract. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440; *Oxley v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 629.

LOUISVILLE AND NASHVILLE R. R.

v.

TRENT.

(11 *Tennessee Reports*, 82.)

A railroad company shipped a car of stock, and the contract to ship provided: "And it is further agreed, that in case of accident to or delay of time from any cause whatever, the owners or shippers are to feed, water and take proper care of stock." The circuit judge charged that in all cases of unavoidable delay, the railroad was by the contract obligated to feed and water the stock. This was error. The terms of the contract only provide that the owner or shipper shall feed and water the stock in certain defined emergencies, and does not undertake that, in all other cases the carrier shall do so.

APPEAL from the Circuit Court of Fayette County.

H. B. Folk and H. C. Moorman for Railroad.

Geo. Hardin for Trent.

TURNER, J.—In December, 1879, defendant in error shipped from St. Louis to Stanton, Tennessee, a car-load of horses under a contract with the St. Louis & Cairo Short Line R. R.

This suit is brought against the Louisville & Nashville R. R., one of the connecting lines, to recover damages for injury sustained by the horses, and also an amount paid under protest for feeding the horses at Milan, Tennessee. Amongst others, the contract to ship contains the following stipulations: "And it is further agreed, that in case of accident to or delay of time from any cause whatever, the owners and shippers are to feed, water and take proper care of stock."

"And it is further agreed, that while the said contracting companies' employees shall provide the owner or person in charge of the stock, all facilities in trains or at stations for taking care of the same, the business of the said contracting companies shall not be delayed by the detention of trains to unload and reload stock, for any cause whatever," etc.

The court, in substance, charged the jury, that in all cases except of unavoidable delay, accident or collision, that the railroad companies were, by the contract, obligated to feed and water the stock.

This was error.

The language of the charge is too comprehensive. The terms of the contract only provide that the owner or shipper shall feed, water, etc., in certain defined emergencies, and does not undertake

that, in all other cases the carrier shall do so. The latter is a question to be determined from all the facts of the case, and is not, in terms, provided for in the written contract for shipment.

Reversed.

Feeding and Watering Live Stock in Transit.—A carrier of live stock is bound at common law to feed and water them while they are in transit. *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61; *Dunn v. Hannibal & St. Joe R. Co.*, 68 Mo. 268.

But by special contract this duty may be thrown upon the owner of the goods, in which case the carrier is not liable for neglect thereof. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606; *Heineman v. Grand Trunk R. Co.*, 81 How. Pa. 430; *Cragin v. N. Y. Central R. Co.*, 51 N. Y. 61.

But see *Dunn v. Hannibal & St. Joe R. Co.*, 68 Mo. 268; *Bryant v. S. W. R. R. Co.*, 6 Am. & Eng. R. R. Cas. 388.

AYRES et al.

v.

CHICAGO AND N. W. RY. CO.

(*Advances Case, Wisconsin. November 20, 1888.*)

In an action against a railroad company the complaint averred that the defendant neglected for several days to provide cars at its station to transport cattle, and that when said cars were furnished it neglected and refused to transport said cattle to their destination with reasonable diligence so that they arrived four days later than they would have done. *Held*, that it did not appear what part of the delay was caused by the failure to furnish cars, and what part by the delays en route, and that the complaint should be amended in this respect.

APPEAL from Circuit Court, Sauk County.

Lusk & Perry for respondents.

W. F. Vilas for appellant.

ORTON, J.—That part of the order denying the motion of the defendant to make the complaint more definite and certain is appealed from. As said in reference to a similar complaint in a previous case on this call, there appears to be no indefiniteness or uncertainty about the allegations of the complaint, except it may be in the matter of damages. Most of the other defects in this respect, complained of, concern facts more specially within the knowledge of the defendant. But in respect to the damages complained of, it is proper that the defendant should be informed what part of such damages is claimed to have arisen from the failure to furnish the cars in proper time as agreed, and what part is

claimed to have arisen by the negligent running of the train and delays on the route. The language of this complaint in that respect is different from that in the other case. In that case the delay in not furnishing the cars as agreed, and the delay in the arrival of the stock in Chicago, is precisely the same, and there was no delay on the route, whatever charged in the complaint. The allegation here is that the defendant "neglected and refused to provide said cars at either station for several days, and when provided, neglected and refused to carry said stock to Chicago with reasonable diligence, and said plaintiffs arrived at Chicago about four days later than they would have done," etc. Here part of the several days' delay in providing the cars may be a part of the four days' delay altogether, and what part of the delay is attributable to not providing cars, and what part to not carrying the stock to Chicago with reasonable diligence, is not stated in the complaint. Therein we think the complaint is indefinite and uncertain, and should be reformed in that respect, and that that part of the motion should also have been granted.

That part of the order appealed from is reversed, and the cause remanded for further proceedings according to law.

See *Baker & Stratton v. Louisville & N. R. Co.*, and note, *supra*; *Richardson v. Chicago & N. W. R. Co.*, *infra*.

RICHARDSON

v.

CHICAGO AND N. W. Ry. Co.

(*Advance Case, Wisconsin. November 20, 1882.*)

Allegations in a complaint considered where the cause of action is the failure to provide cars to transport stock and the failure to transport said stock expeditiously. The allegations held to be sufficiently definite.

It is proper for defendant to be informed of what damages are claimed to have arisen from each of the several acts of negligence with which he is charged.

APPEAL from Circuit Court, Sauk County.
Lusk and Perry for respondent.
W. F. Vilas for appellant.

ORTON, J.—That part of the motion to strike out certain redundant matter from the complaint was granted, but that part requiring the complaint to be made more definite and certain was

denied; and the defendant appeals from that denial. There appears to be no indefiniteness or uncertainty about the allegations of the complaint, except it may be in the matter of damages. Most of the other defects in this respect, complained of, concern facts more especially within the knowledge of the defendant. But in respect to the damage complained of, it is proper that the defendant should be informed what part of such damages is claimed to have arisen from the failure to furnish cars in proper time as agreed, and what part is claimed to have arisen by the negligent running of the train and delays on the route.

It seems to us that the language of the complaint in this respect can have but one meaning, and that is, that no damage whatever is claimed from the negligent running of the train or delays on the route, but that all of it is predicated upon the delay in furnishing the cars at the depots named according to the contract. The allegation is that "the defendant disregarded its duty," etc., "and its assurance and agreement," etc., and "neglected and refused to provide said cars at the time appointed, and as requested and promised as aforesaid, for several days, to wit, about four days." Then, after charging that the defendant company "neglected and refused to carry said stock to Chicago with reasonable diligence," it alleges the arrival of the plaintiff with his said stock at Chicago "about four days later than he would have done had the cars been provided as ordered and agreed, and had the stock been carried to Chicago with reasonable diligence." There was about four days' delay in furnishing the cars, and about four days' delay in all. This leaves no possible chance of any delay on the route. The delay, and consequently the damage occasioned thereby, are charged solely to the delay in not furnishing the cars, and none for not carrying with reasonable diligence. "About four days" is the delay in not furnishing cars, and there was "about four days'" delay, or the same delay in arrival, which leaves no delay on the route. We think this is sufficiently definite and certain.

That part of the order appealed from is reversed, and the cause remanded for further proceedings according to law.

See *Baker & Stratton v. Louisville & N. R. Co.*, and note, *supra*; *Ayres v. Chicago & N. W. R. Co.*, *supra*.

MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RY. CO.

v.

BROWN.

(English L. R. 8 H. L. Cas. 708.)

A fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, reversing the decision of the Court of Appeal, that upon the facts the merchant had a bona fide option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 81) s. 7, and covered the delay; and that the company were not liable for the loss.

APPEAL by the defendants from an order of the Court of Appeal.

The facts stated by the County Court judge in a case for the opinion of the Queen's Bench Division, so far as they are material to this report, were as follows:

The plaintiff, a fish merchant at Grimsby, had been in the habit for years of delivering to the defendants to be forwarded to the Billingsgate market consignments of live cod fish, and on or about the 28th of December, 1880, signed a "risk-note," in the words and figures following:

"Manchester, Sheffield and Lincolnshire Railway.

"Risk-note.

"Grimsby Docks Station, 28th Dec., 1880.

"Mr. Henry Brown.

"Fish Traffic.

"Sir,

"I beg to inform you that to parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will

be one fifth lower than where no such undertaking as the annexed is granted.

<p>“And for smacks: “Adventure, B “Afghan, “Zulu, “Amity.</p>	<p>W. W. H.</p>	<p>“I am, Sir, “For and on behalf of the Company, “Your obedient servant, “James Reed.”</p>
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“28th Dec., 1880.

“Sir: In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

“This undertaking to remain in force from the present date until 31st Dec., 1885.

“I am, Sir,
 “Your obedient Servant,
 “Henry William Brown.”

The whole of the above risk-note, with the exception of the plaintiff's name, was in a lithograph form, furnished by the company.

After the making of the risk-note, all fish delivered by the plaintiff to the defendants to be forwarded was forwarded by them at the rate mentioned therein. On the 13th of April, 1881, the plaintiff delivered to the defendants to be carried from Great Grimsby to London a load of cod fish, which they accepted, though owing to the heavy traffic (being two days before Good Friday) it could not be forwarded in time for the Billingsgate market. No notice of this was given to the plaintiff who, if notice had been given, could have kept his fish alive and avoided loss. The fish lost the market, and the plaintiff suffered a loss, the amount of which was agreed upon as £1.

The judge held that the defendants had failed to justify the delay in delivering the fish consigned to them for carriage, and that they were not protected by the risk-note, and directed judgment to be entered for the plaintiff for £1 and costs. The question for the opinion of the Court was whether such judgment was right.

The Queen's Bench Division entered judgment for the defendants (6 Am. & Eng. R. R. Cas. 481). The Court of Appeal (Baggallay, Brett and Lindley L.JJ.) reversed that decision and entered judgment for the plaintiff (L. R. 10 Q. B. Div. 250).

The judge's notes of what passed at the trial before him on the 29th of July, 1881, were also among the papers before the House, and from these it appeared that the plaintiff admitted on cross

examination that he "might have saved £20 by the risk-note that year;" and stated that "persons who sign risk-notes send their fish, if they want to do so, on the ordinary terms, by sending it in somebody else's name."

Sir F. Herschell S.G. (Gully Q.C. and C. A. Russell with him) for the appellants.

Webster Q. C. and Bray for the respondent.

LORD BLACKBURN.—My Lords, I do not think that we need trouble the Solicitor-General to reply. The case has been argued at great length and is one of importance. There has been a unanimous judgment of the Court of Appeal reversing the judgment of the Divisional Court, but as we have heard the arguments at such length I do not think that there is occasion to take time to consider our decision.

The first thing to be looked at is, What does the contract in this case set out? The appellants say, "To parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one fifth lower than where no such undertaking as the annexed is granted." The party on the other side, the fishmonger, says, "I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage." The first question which arises is, Supposing that the Railway and Canal Traffic Act were repealed and that we were considering the case free from any difficulty about that Act, would the effect of this contract be to protect the company from the damage which is claimed in this case? It is said that it would not, on two grounds. First, Mr. Webster endeavored to argue that here the damage was not from any loss, or damage, or delay in the course of the transit, but was from misconduct on the part of the company in not warning the respondent, before he killed his fish and sent them to the station, of the delay which would arise if he sent them, and that that was a cause of action. Next, it was said that such a contract ought to be construed (whatever the parties meant) not to include protection to the company from the negligence of themselves or their servants, that we are forcibly to construe it in that way, though the intention of the parties might be to the contrary. Now there was some ground for maintaining that argument. *Wyld v. Pickford*, 8 M. & W. 443 (I think it was), certainly did seem to state that a party in that position was entitled to say that the contract was to be so construed. But then I think *Hinton v. Dibbin*, 2 Q. B. 646, now about forty years ago, decided quite the con-

trary; and there have been a great many cases since, proceeding upon the same principle. I believe that most of them are referred to in the opinion which I delivered in the House of Lords in the case of *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 497, and the result was what I pointed out, that such a contract as this was meant to protect, and did in effect protect, the company from the negligence of their servants.

Mr. Webster argued that the case of *Phillips v. Clark*, 2 C. B. (N. S.) 156, and other cases of that kind were inconsistent with that view. I do not think that they are so at all. I think that the reasoning of those cases is this: when an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, "perils of the seas excepted." Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, "I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage." And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused, that is to be cut down and made, contrary to the intention of the parties, not to include the negligence of his servants.

Passing from that point, we come next to the question whether this contract is made void by the Railway and Canal Traffic Act. There was a great deal of opposition to that Railway and Canal Traffic Act when it was first passed, and many people said that it was most unjust, and so on; but it was ultimately decided, in *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473, that it is valid and effectual until the legislature choose to repeal it, to this extent, that contracts, even though signed (which they must be to be valid, and as this contract is), are void if they purport to free a railway or canal company from responsibility for the negligence of their servants, unless they are adjudged reasonable by a judge or a court. And the question comes to be here, What are the grounds upon which a court (which your Lordships now are for that purpose) is to consider whether this contract is reasonable or not, and what are you to adjudge upon it? Now on that subject we have certainly an alternative, for in the very terms, and on the face of the contract it is said, "The company agree that the rates charged will be one fifth lower than where no such undertaking as the annexed is granted." So that it is quite clear upon the face of the contract that there is to be a reduction of one fifth, twenty per cent, from the rates actually charged, if the parties

choose to avail themselves of it. I do not think that the mere fact of its being said that there is another charge, would be of itself sufficient to make this contract reasonable. The spirit and object of the enactment in the Railway and Canal Traffic Act are very well expressed in *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, 342. "The real question," says Crompton, J., in delivering the judgment of the Exchequer Chamber, "is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly." The mischief was supposed to consist in giving a practical monopoly to the railway companies by compelling people to enter into contracts whether they willed it or no. The Act says, "If you have signed a written contract expressing a certain condition, a judge or a court shall see whether it is reasonable or not." Crompton, J., says, and I think rightly says, that in order to judge whether it is reasonable or not you must look at this consideration, Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of that monopoly?

Now I think it will be seen that in this case there was really a reasonable means of the goods being carried, and that the company offered to fulfil their duty as common carriers in saying, "We will carry all goods that are brought to us, fish and otherwise, on being paid a reasonable remuneration—we will carry them according to the custom of the English realm, and will safely deliver the goods unless certain excepted things prevent their being so delivered." There is superadded that which is not part of the custom of the realm, also an obligation to use reasonable care and reasonable skill to deliver the goods within a reasonable time. That is superadded, I think, by the law to the duty which by the custom of the realm is cast upon a carrier; there is that duty to deliver with reasonable dispatch and without unreasonable delay. Now upon that, if the company have really offered and said, and do in fact say, "We will carry your goods, subject to this liability, on payment of a reasonable price," I myself think (although it seems to be treated as an absurdity to reason in that way) that so long as they are offering and are willing to carry at a reasonable price and to fulfil their duty, it cannot be unreasonable to say, "If you prefer your goods being carried on other terms we will agree to it." Whatever these contracts are, the parties are not left at arm's length, and the mischief which the Railway and Canal Traffic Act supposed to exist, of individuals and the public being coerced by a practical monopoly, does not arise, for they can have their goods carried according to the terms of the Common Law without being called upon to pay anything more than a reasonable remuneration.

Now I am not prepared to say that where there are maximum rates fixed, as no doubt there are on this railway, everything

within these maximum rates must be a reasonable remuneration. I do not say whether that is so or not. That may be a matter worthy of consideration in some other case. But I do say this, that when there has been a rate fixed, if it be shown in point of fact that although people can have their goods reasonably carried at that rate they do enter into agreements of this sort to have them carried at another rate, that is extremely strong evidence that the agreement is reasonable, and I should think that no court would fail so to find it if that evidence was produced before them. Now in this case, which is said to be a representative case, that statement is of importance; but it does not appear to have occurred to the learned judge of the county court nor to the people there to consider the point whether or no the ordinary rates, that is to say the rates 20 per cent higher than the rates charged under this contract, were in fact practically operative in the way I have just mentioned. If they were positively deterrent and merely illusory, and if no fish whatever were sent in that way, it must have been perfectly well known by every one of the fishermen in Grimsby, and perfectly well known, I should think, to the county court judge. If they were in practical operation and if fish were carried at those rates, that also would be well known. I dare say that if it had occurred to anyone that that fact was of importance, there would not have been any difficulty about stating it; but it does not seem to have occurred to any one that it was so, and all that we have really is that the plaintiff himself, after being asked in cross-examination whether he did not make a profit by the risk-note, incidentally says in re-examination, "I know personally the course of practice in sending fish by persons who sign risk-notes. Such persons send their fish, if they wish to do so, on the ordinary terms, by sending it in somebody else's name." Now it is wonderful that in such a case as this the point should be reduced to that very little piece of evidence, but on that evidence of the plaintiff himself stating that he personally knows that to be the course of business I can form no other conclusion, and I do not think your Lordships can form any other conclusion, than that those ordinary rates, as he calls them, are in practical operation, the railway company finding customers at them, and persons coming at those rates; and that being so, I do not think that any judge ought to ask for stronger evidence than that to enable him to say that there was a real bona fide alternative in this case. And Lindley, L. J., seems to agree that, if he could have come to the conclusion which I have said that I have come to, namely that there was such a bona fide rate, he would have thought that this contract was reasonable enough. But the other two judges in the court of appeal, Baggallay, L. J., and Brett, L. J., seem to argue (as far as I can understand what they say) in this way, that nothing can be reasonable practically between the rail-

way company and the trader, because if the trader does not take the best bargain, and does not choose to do the best thing, he will be undersold by others; so that the trader, no matter whether he is dealing with a railway company or with anybody else, never can be a free agent; if it is a carrier by water the trader is not a free agent, and must send his goods on the cheapest terms that he can, without being a free agent. That to my mind is not legitimate reasoning.

LORD BRAMWELL.—Lindley, L. J., says so to. He says, "In the case now before the court the plaintiff was a fish merchant sending his fish to market, and practically he was compelled to send his goods at the lower rate. It is true he was not compelled to do so by the defendants, but it is plain that unless the plaintiff sent his fish as cheaply as he could, he would be undersold in the market by his competitors in trade."

LORD BLACKBURN.—If it be a carrier by water or a carrier by land where there are no railways, the trader makes a bargain with that carrier if he pleases. It might as well be argued that he is in the same position as he was before the Railway and Canal Traffic Act was passed, without remedy. But then it is said by the legislature in that Act, "Inasmuch as railway and canal companies have a practical monopoly given to them by virtue of their powers, we will protect you against the abuse of that practical monopoly." And I think that that is accurately expressed in the case of *Beal v. South Devon Ry. Co.*, 3 H. & C. 337, 342, in considering whether the condition is an unreasonable condition or not. I should therefore here take it as a matter of fact, and I certainly find that here there is a real practical mode in which fish are carried upon these ordinary terms in actual use, which consequently I must take to be reasonable terms. There is no practical monopoly pressing upon the parties on account of which they are obliged to act in a particular way. They find it to their advantage in their trade to accept the offer of an alternative, and that offered alternative is not unreasonable.

For these reasons, taking this view, I think that the order appealed against should be reversed, and the judgment of the Divisional Court restored; and of course the costs will be paid by the respondent. I accordingly so move your Lordships.

LORD WATSON.—My Lords, I so thoroughly agree with the observations which have been made in this case by the noble and learned Lord who had just spoken that I shall merely say a word or two in addition.

The only doubts that I have felt in this case have arisen from these circumstances. In the first place the case framed by the

county court judge was obviously not intended to raise the questions which have been mainly discussed at your Lordships' bar. The only point which that learned judge seems to have had in view in delivering judgment, and in subsequently framing a case between the parties, was whether every contract between a railway company and a trader which exempts the railway company from the consequences of the default or negligence of their servants, is necessarily an illegal contract. The learned judge in his opinion, to the terms of which I need not particularly advert, plainly drew from the case of *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473, what I consider to be an erroneous inference, namely, that it had been held by the House that such a condition could in no circumstances be inserted in a written contract between the parties without rendering that contract or condition null and void under the statute of 17 & 18 Vict.

The other circumstance which to some extent weighed upon my mind was the fact that the three learned judges of the Appeal Court were unanimously of opinion, upon quite a different ground, that this was an illegal condition. Shortly stated, the reasons for which I differ from those learned judges are these. I am satisfied in point of fact that the railway company, the appellants, are offering to carry at a reasonable rate with all the liabilities of common carriers; but they also, on condition of being relieved of these liabilities, offer to carry goods of the same class at a lower rate. Now it might be that the special rate offered was so much lower than the ordinary rate, for which they propose to carry as common carriers, as to make the latter a prohibitory rate that nobody would resort to, and in that case the lower might fairly be represented as a compulsory rate. But I can find nothing of that kind here. *Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shown to be, in certain circumstances, unreasonable, but I think the *a priori* presumption is in favor of its reasonableness; and here there is evidence from the mouth of one of the parties, the respondent himself, to the effect that the rate is, by some traders, dealers in fish, acted upon.

Then as regards the special rate, I am not prepared to adopt the view which seems to have been taken by the learned judges of the Appeal Court, that whenever the lower rate without liability on the part of the company is such as to induce the bulk of the traders to prefer it to the ordinary rate with liability on the part of the company, the conditions attached to the lower rate must necessarily be illegal and void. That does not appear to me to be a reasonable construction of the words of the statute, "just and reasonable condition." It does not appear to me to be warranted by the judgment of this House in *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473. That case authoritatively decides;

upon the statute, these three points—in the first place, that a condition of this kind must be in writing in order to bind the trader; in the second place, that it must be proved to the satisfaction of the court to be a reasonable condition; and, in the third place, that the onus of showing that it is a reasonable condition rests upon the railway company who allege it.

But the question as to what constitutes a reasonable condition is a question of fact and not a question of law, and must be judged of according to the circumstances of each case. No doubt there are many very valuable suggestions in the case of *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473. But we are not dealing with a case in its circumstances similar to that, because it was there held that the company had charged a high rate as common carriers, not for the honest and bona fide purpose of giving an alternative to the trader, but practically with the view of giving no alternative and compelling him to adopt the one rate in preference to the other. I cannot see in the present case the least trace of that compulsion. I cannot find anything in the character and facts of this case to suggest to my mind that the condition is unreasonable. On the contrary, it appears to me to be reasonable; and therefore I have come to the conclusion that I should not be giving effect to the terms of the statute if I did not concur in the proposal to reverse the judgment of the court below and to return to that of the Queen's Bench Division.

LORD BRAMWELL.—My Lords, the case of *Peek v. North Staffordshire Ry. Co.*, 10 H. L. C. 473, was decided twenty years ago. At the time it was decided, and from thence continuously until now, I have thought it was wrongly decided, as I know it was contrary to the intention of the framers of the Act; and this case confirms me in that opinion. For here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business. And although that case has been in existence for twenty years, and has been acted upon in courts of law, if it were within my competency to overrule it I would do so, because it is impossible to say that people have regulated their contracts in reference to it: they have done nothing of the sort. What they have done is this: they have entered into their contracts without reference to it, and when it has become convenient they have broken those contracts, and having had the benefit of them they have turned round and have sought to avoid them.

Now, I should not like to say that in this case the plaintiff was doing a thing which he knew he ought not to. In all probability he has not the slightest notion in the world of what are the merits of the question that has been argued before us; but it stands con-

fessedly that he has put £20 into his pocket by virtue of the contract, and he is now seeking to avoid it as an unjust and unreasonable one, yet keeping the £20. However, we are bound by the case that I have mentioned, and consequently we must say whether or not this contract is just and reasonable. Now I will not say that it is impossible that a contract can be unjust and unreasonable where both the parties who have entered into it would have fully understood it. Nay, I would go further, and would say that I could understand, if, for instance, where a company were entitled to charge £100 for the carriage of a thing they took off 5s. upon the footing of their being exempted from all responsibility, that peradventure a man who had entered into that contract with them might say, "No, I have discovered that that 5s. which you have let me off is not an equivalent, nor anything like an equivalent for the loss which I sustain by your getting rid of your responsibility." I think such a state of things as that may be possible. I will not say it is not, though I should listen reluctantly to the fishmonger saying, "I did not ask for a sufficient abatement." However, putting that as an illustration, without putting further ones, I am not prepared at this moment to say that it is an impossibility that a contract knowingly and voluntarily entered into by two parties could be unjust and unreasonable. If it is not voluntarily entered into, that is a very different thing. But, for my own part, I am prepared to hold that unless some evidence is given to show that a contract voluntarily entered into by two parties is unjust and unreasonable, it ought to be taken that that contract is a just and a reasonable one, the burden of proof being upon the man who says that it is unjust and unreasonable. First of all, its justice and reasonableness are *prima facie* proved against him by his being a party to it, and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so. I am prepared to hold that. In this particular case, that it is just and reasonable is to my mind beyond the slightest doubt, looking at the profit which the plaintiff has made by it. And when it is said: "Why, what an unreasonable thing it is that you should exempt yourselves" (as I own I think this agreement does) "from all responsibility, even for the wilful default or wilful act of your own servants," I deny that there is anything necessarily unreasonable in it. I say that any man who wants to make out that it is unreasonable must prove it. I can perfectly understand (as I put in the course of the argument) a man going to a railway company and saying: "Now I deal with you; you carry fish for me; we often fall out, we have disputes; sometimes the fish is late, sometimes it is injured; sometimes it is your fault, sometimes it is not; we get into trouble and into litigation with each other; if you will make me an abatement of five per cent," or ten per cent, or twenty per cent, or whatever he thinks fit to ask and they agree to, "I will

undertake to hold you not responsible even if the fish is spoilt or stolen by your own servants." I can understand that to be a perfectly reasonable proposal for him to make and for the company to accept. It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not. If it is a question, it is one of fact; and evidence should be given to show that the fishmonger and carrier did not understand their business, but made an unjust and unreasonable contract. However, so it is, and I repeat that I am for my own part prepared to hold, not that an agreement between two people which has been voluntarily entered into by them cannot be unreasonable, but that the fact that it has been voluntarily entered into by them is the strongest possible proof that it is a reasonable agreement, and that I should require the strongest possible evidence, or something more even than a possibility, to show me that that was an unreasonable agreement.

Now, in my opinion, this was a voluntary agreement. That is the question which we have to consider, and the fact that there was an alternative is only of importance as showing that the agreement was voluntary; because if there is no alternative then, although the agreement is come to in terms, yet in truth in a sense it is no agreement between the parties, because there is a compulsion on one of them to enter into it. Therefore, it becomes of importance to see whether there was an alternative, for the purpose of seeing whether the agreement was a voluntary one. Now there was most obviously an alternative. The plaintiff might have sent his fish, if he had liked, paying 20 per cent more than he did; that is to say, paying £100 where he paid £80. If he had liked he might have sent his fish, paying that ratio with liability in the carrier; or he might have sent it upon the terms upon which he did send it, and he chose the latter.

Really, it is difficult for me to express the opinion which I entertain upon this question with a sufficient appearance of the respect I have for the opinion of those who have thought differently, namely, the learned judges in the court below. They seem to say that there is no option because the terms are too good—the benefit given to the plaintiff is too great; that if a less benefit were given to him and to all the other senders of fish, if, instead of 20 per cent being taken off the price it were 10, or peradventure 5 (for 10 might be too much for aught I know), then indeed there would be an option, but as it is it is such an irresistible temptation to him, I suppose, it is so good a thing for him, that he has no choice but to take it. The argument comes to this: the allowance is so just and reasonable to all fish dealers that it is unjust and

unreasonable to each of them. Well, one has heard a great many discussions about free will, but I protest this is a novelty—I never heard anything like it before—it is the most extraordinary proposition that I ever heard in my life. The assumption that he is obliged to do it because he cannot otherwise compete with his fellow fishmongers is the most gratuitous one that was ever invented in this world. He says that he has put £20 into his pocket; but suppose that his profit was twenty times £20, or two hundred times £20 in the course of the year, which for aught we know it might be, there is not the slightest proof that it is not so—it is said that because he has put £20 into his pocket we are to infer that he could not carry on his trade unless he could put that £20 into his pocket, and therefore that the thing is of a compulsory nature, and that he has no option, no choice, and that consequently his agreement is not voluntary. I repeat that I really do not understand how such a conclusion could have been come to, except by some generous feeling that railway companies ought to be kept in order for the benefit of fishmongers.

Now, just let me ask this question—"Just and reasonable"—Is it just? If it is not, it is unjust. Is it unjust? Will any human being say that this man has been unjustly treated? Well, but justice alone is not sufficient; you must not only be just, but you must be reasonable, which, by the way, rather imports that you may be one without the other. I should think that that was an extremely difficult thing. However, if it is just, is it reasonable? Why its very justice shows its reasonableness.

I must say that I really do think this is about the plainest case that ever came before your Lordships' house.

LORD FITZGERALD.—My Lords, I concur. The question for our consideration is whether the conditions expressed in the special contract signed by the plaintiff are just and reasonable. Such a question always involves matters of fact as well as legal considerations, and probably was made a question for judicial decision in order to afford some protection to parties dealing with carriers and public companies against injustice and oppression, and insure for them freedom of contract. The true construction of the special contract has been raised before us, and I think that its conditions must be read according to the ordinary and natural meaning of the language used, and that your Lordships would not be justified in importing or implying any limitation not expressed. Read in that light the language is large enough to protect the defendants from the negligent conduct of their servants, but I am not inclined to go further. If your Lordships were to interpret it as protecting the defendants from wilful misconduct, then a large and important question would arise for determination, namely, whether a contract which wholly relieved the company from liability for loss

or damage and exonerated them from all the obligations of duty, was not in itself unjust and unreasonable, and contrary to the policy of the law.

Assuming, then, that the special contract, if it stood alone and without more, might have been unreasonable, it may become fair and reasonable if a proper alternative was offered to the plaintiff. The alternative in my judgment was a fair and reasonable one. It was to carry at a rate which we must deem to have been reasonable as it was less than the parliamentary rate, and subject to all the liabilities of carriers at common law. The defendants at the same time offered to carry at a reduction of 20 per cent if relieved from certain common law liabilities.

The plaintiff deliberately rejected the first and accepted the second—and signed a contract to that effect. He now asks to be relieved from it, alleging that it was unjust as imposing on him unreasonable conditions, and that in effect he was coerced to adopt it, having no option. The Court of Appeal seems to have been of that opinion, and two of the Lord Justices seem to rest their decision on the ground that the plaintiff was not a free agent.

Thus Baggallay, L. J., after giving his impression on what I cannot help thinking was the main question, is represented to have said: "But I do not think it necessary to express a definite opinion upon that point now; because it appears to me that, having regard to the circumstances of this case, there really was no option as between the two modes of carriage which the plaintiff could adopt. I think, therefore, that this appeal must be allowed." And Lindley, L. J., thus expresses his final opinion: "It follows from the foregoing reasoning that in my opinion such a contract as the one before us might be reasonable under other circumstances; and I cannot go to the length of my brothers Baggallay and Brett and say that such a contract must be unreasonable in all cases. I should consider it reasonable in all cases in which the customer was not practically compelled to adopt the lower rate. Under such circumstances I should concur with Lords Blackburn and Bramwell, and with the decision in *Simons v. Great Western Ry. Co.*

In that view I am unable to follow the Lords Justices, but though differing from them with hesitation I prefer the opinion of Mathew, J., in the Divisional Court, when he says: "It is perfectly clear here that the customer was free if he chose to have gone to the company and demanded that they should have carried his goods as common carriers. In that state of things they would be liable in the ordinary way for all the risks of the carriage. But the company, in lieu of that contract which rendered them liable for all the risks of the journey, proposed to the customer the terms which I have just read, and in consideration of his accept-

ing those terms they proposed to carry his goods at one fifth less than the ordinary rate; and the customer agrees to those terms." Why should the plaintiff be relieved from the contract he has deliberately accepted? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate—the alternative offered to him was fair, and I can discover no ground on which we can treat this special contract as a fraud on the statute or relieve the plaintiff from its consequences.

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to repay (according to the undertaking given) the costs in the court below; and to pay the appellants their costs in the Court of Appeal and their costs of this appeal; cause remitted to the Queen's Bench Division.

English Railway and Canal Traffic Act.—By the terms of this act all limitation of liability on the part of carriers by mere notice is prohibited. Their liability may, however, be limited by special contract provided the conditions thereof are in the opinion of the court "just or reasonable." A contract which is on its face apparently unjust and unreasonable may be considered valid if the party forwarding the goods had an option which he has declined to forward them on just and reasonable terms. *Gallagher v. Great Western R. Co.*, 18 Irish C. L. (N. S.) 326.

It will be observed therefore that every case stands to a great degree upon its own merits.

Just and Reasonable Conditions.—In the following cases the conditions contained in the special contract of carriage have been held to be just and reasonable: *Aldridge v. Great Western R. Co.*, 15 C. B. (N. S.) 582; *Simons v. Great Western R. Co.*, 18 C. B. 805; *Lewis v. Great Western R. Co.*, 5 H. & N. 867; *Beal v. South Devon R. Co.*, 3 H. & C. 337; *White v. Great Western R. Co.*, 2 C. B. (N. S.) 7; *McClure v. London, etc., R. Co.*, 7 H. & N. 477; *Harrison v. London, etc., R. Co.*, 2 B. & S. 12; *Wise v. Great Western R. Co.*, 1 H. & N. 63; *Robinson v. Great Western R. Co.*, 35 L. J. (C. P.) 123; *Lord v. Midland R. Co.*, L. R. 2 C. P. 339; *Pardington v. South Wales R. Co.*, 1 H. & N. 392; *Lewis v. Great Western R. Co.*, L. R. 3 Q. B. Div. 195; *Moore v. Great Northern R. Co.*, 8 L. R. N. 95.

Unjust and Unreasonable Conditions.—In the following cases the conditions contained in the contract of carriage have been held unjust and unreasonable: *Gregory v. West Midland R. Co.*, 2 H. & C. 944; *Rooth v. Northeastern R. Co.*, L. R. 2 Exch. 173; *Gaston v. Bristol, etc., R. Co.* 1 B. & S. 112; *Allday v. Great Western R. Co.*, 5 B. & S. 903; *McManus v. Lancashire R. Co.*, 4 H. & N. 327; *Doolan v. Midland R. Co.*, L. R. 2 App. Cas. 792; *Lloyd v. Waterford, etc., R. Co.*, 15 Ir. C. L. (N. S.) 87; *Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473; *Ashenden v. London & B. R. Co.*, L. R. 5 Exch. Div. 190; *Carigan v. Great Northern, etc., R. Co.*, 6 L. R. Ir. 90; *Hill v. London & N. W. R. Co.*, 42 L. T. 513; *McNally v. Lancashire & Yorkshire R. Co.*, 8 L. R. Ir. 81.

ISAACSON

v.

NEW YORK CENTRAL AND HUDSON RIVER R. R. Co.

(94 *New York Reports*, 278.)

A carrier of passengers, by the sale of a passenger ticket, as incident to the contract, without any specific agreement or separate compensation, becomes obligated to carry the baggage of the passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly authorized agent.

The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier.

It is within the apparent authority of a baggage-master so to check baggage, and where he receives it and agrees to check it through by a particular route the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury.

It seems that a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or fixing a special or unusual mode of delivery, as at a place other than the depot of the company.

The usual baggage-check delivered to a passenger is not regarded as embodying the contract of carriage, but only as a voucher or token to enable him to identify and claim his baggage at the end of the route.

In an action to recover for loss of baggage these facts appeared. Plaintiff held passage tickets for himself and family over defendant's road from New York to Niagara Falls, and also tickets from the latter place to New Orleans by the "Mobile route," in which route it did not appear that defendant had any interest, but it, in connection with defendant's road, formed a continuous line between New York and New Orleans. Plaintiff presented these tickets with his baggage to the baggage-master at defendant's baggage-room in New York city and requested him to check the baggage from New York to New Orleans by the route indicated. The baggage-master examined the tickets, assented to the request and gave plaintiff checks for his trunks, which he put in his pocket without examination. Upon the checks were the words "New Orleans and New York," and also certain letters and abbreviations which, as explained by experts, indicate the several roads forming the "Great Jackson route." Defendant delivered the baggage to the agent of the Great Jackson route at Niagara Falls, and while in transit it was destroyed by an accident. *Held*, that the undertaking of the baggage-master to check by the Mobile route was the undertaking of defendant, and included an agreement to deliver at the end of its road to the next succeeding carrier; that by the delivery to another carrier, in the absence of contributory negligence on the part of plaintiff, it remained liable as insurer; also that the omission of plaintiff to examine the checks was not such contributory negligence as prevented a recovery; that at least it was a question for the jury as to whether he had a right to repose upon the representation of the baggage-master without examining the checks, also as to whether an inspection of the

checks would have apprised a person, not an expert or familiar with the roads, making up the routes between New York and New Orleans, that a mistake had been made.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 28, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing the complaint on trial.

This action was brought to recover damages for the loss of plaintiff's baggage while en route from New York city to New Orleans.

The material facts are stated in the opinion.

Horace E. Deming for appellant.

Frank Loomis for respondent.

ANDREWS, J.—The plaintiff failed to establish a contract by the defendant to carry him and his baggage from New York to New Orleans, via the "Mobile route" from Niagara Falls, as alleged in the complaint. On the contrary the proof conclusively negatived the existence of a through contract by the defendant. The only contract between the plaintiff and defendant for the carriage of the former was made at Niagara Falls, about July 1, 1876, through the purchase there by the plaintiff, of tickets for himself and family over the defendant's road from Niagara Falls to the city of New York, and from the latter place to Niagara Falls on their return. The plaintiff at that time held return tickets from Niagara Falls to New Orleans by the Mobile route, purchased at New Orleans. There is no evidence that the defendant was interested in that route. It appeared that this route in connection with the defendant's road formed a continuous line of railroad between New York and New Orleans, but no community of interest between the defendant and the several corporations operating the lines of road embraced therein was shown.

The case, however, was not disposed of on the trial, upon any question of pleading. The facts were shown without objection, on the ground of variance. The nonsuit was granted upon the ground that the facts proved did not disclose a cause of action, and this is the only question presented on this appeal.

The essential facts may be briefly stated. The plaintiff on the 17th of August, 1876, having tickets above stated, entitling him and his family to be carried from New York to New Orleans, via the Mobile route from Niagara Falls, presented them with his baggage to the baggage-master at the baggage-room of the defendant in the city of New York, and requested the baggage-master to check the baggage from New York to New Orleans by the route indicated by the tickets. The baggage-master asked to see the tickets, examined them and thereupon gave the plaintiff two checks for his trunks from New York to New Orleans. The plaintiff took the

checks, put them in his pocket without examining them, and afterward gave them to his wife for safe-keeping. On the same day the plaintiff and his family commenced their return journey to New Orleans on the route indicated by the tickets, and when near New Orleans the checks were handed to the agent of a transfer company, with directions to deliver the baggage at the plaintiff's residence in that city. It was then ascertained that the checks were those used for baggage sent from New York to New Orleans via what is called the "Great Jackson" route from Niagara Falls. It subsequently transpired that the plaintiff's baggage was in fact sent from Niagara Falls over the route indicated by the checks, and that while in transit, it was substantially destroyed by an accident at Tugaloo, Miss. The case contains a printed fac simile of the checks. The words "New Orleans and New York" are distinctly shown on the checks, and at the bottom are numerous letters and abbreviations which, as explained, indicate the several roads constituting the "Great Jackson" route from New York to New Orleans.

The delivery of the baggage by the defendant at Niagara Falls to the agents of the Jackson route, was in direct violation of the plaintiff's instructions and of the undertaking of the baggage-master on receiving the baggage. The acts and conduct of the latter on that occasion are consistent only with the theory that he assented to the plaintiff's request to check the baggage by the Mobile route, and through ignorance, negligence, or mistake, checked it by the Jackson route. If the undertaking of the baggage-master, to check the baggage by the Mobile route was in law or in fact the undertaking of the defendant, its liability for the loss of the baggage, in the absence of contributory negligence on the part of the plaintiff, is settled by authority. The agreement to check the baggage by the Mobile route included an agreement *ex vi termini* to deliver it at the end of its road to the next succeeding carrier on that route. If such delivery had been made, the defendant's responsibility would have terminated. But having misdelivered the baggage contrary to the agreement, to another carrier, it remained liable as insurer for any injury or loss occurring on the route upon which the baggage was diverted. *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 610; *Condict v. Grand Trunk R. Co.*, 54 id. 500, and cases cited.

The defendant rests its defence to the action on two grounds, first, that the agreement of the baggage-master to check the baggage by the Mobile route was unauthorized and did not bind the defendant; and second, that the omission of the plaintiff to examine the checks was contributory negligence, which prevents a recovery.

It will be useful in determining the principal question, to refer to the obligation which a carrier of passengers by rail assumes on the sale of a passage ticket in respect to the personal baggage

of the passenger. The carriage of the baggage of the passenger, under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger, and the duty arises on the part of the company to carry the baggage of the passenger, as incident to the principal contract, without any specific agreement or separate compensation. The obligation, moreover, includes, as in the case of merchandise, an obligation to deliver the baggage carried. *Cole v. Goodwin*, 19 Wend. 251; *Powell v. Myers*, 26 id. 591. There arises therefore on the sale of a passenger ticket a contract to carry the person and the baggage of the passenger between the points indicated, on the road of the company issuing it, and to deliver the baggage at the end of the route to the passenger or his duly authorized agent. In this State a statutory duty is also imposed upon railroad companies receiving baggage for transportation, to affix to each parcel a metallic check with numbers stamped thereon, and to deliver a duplicate to the passenger or owner. Laws of 1847, chap. 272, § 6; Laws of 1850, chap. 140, § 37. These statutory provisions prescribe the duty of railroads within the State, receiving baggage to be transported to points on the line of the road receiving it, and impose no obligation to check baggage beyond such line, but they contain, so far as we know, the first legislative recognition of a system which has expanded to meet the growing demands of the business, so that the checking of baggage has become the common incident of railroad passenger transportation in the United States. Personal delivery of baggage to the passenger at the end of the transit on a particular road, has to a great extent been superseded in case of through passengers having tickets for an entire route owned and operated by separate but connecting lines, by the custom of the first carrier checking the baggage to the final destination and delivering it at the end of his route to the next succeeding carrier, who in turn delivers it to the next carrier, and so on toties quoties until it reaches the possession of the last carrier on the route. This general practice is a matter of common observation and experience, and has so become a part of the common knowledge of the community that courts may take judicial notice of its existence. It has been generally adopted by reason of its manifest utility and convenience, and the practice promotes the mutual interests of the railroads and the public. It may not be, and probably is not a practice obligatory upon railroad companies, and mutual arrangements between connecting roads must be made before the practice can be adopted; but the fact remains, that in most cases such arrangements are perfected, and a traveller having a through ticket over connecting lines may reasonably expect, on delivering his baggage to the first carrier, to receive a check relieving him from the necessity of seeing to its transfer to the several successive roads on the line of travel.

We come now to the question as to the authority of the baggage-master to bind the defendant by an agreement to check the plaintiff's baggage by the Mobile route. There is no evidence of the actual authority, oral or written, conferred upon the baggage-master upon his appointment. Whether in fact he had authority to check baggage over the Mobile route, or whether the defendant was accustomed to check baggage over that route, does not appear. He had authority to check over the Jackson route, as is inferable from his being trusted with checks over that line. But the authority of an agent may be implied in many cases from his official designation, the position in which he is placed, and the duties which naturally appertain thereto. Parties may deal with the agents of corporations upon the presumption that they possess the powers usually assigned to the office they hold (2 Kent's Com. 350, note, and cases cited), and the principal is bound as to third persons acting in good faith, by the act of an agent within his apparent authority, although in the particular instance it was unauthorized. In considering the inference to be drawn as to the authority of the baggage-master in this case from his official designation, and from the fact that he was acting as the agent of the defendant in receiving baggage of passengers, the jury was entitled to take notice of the usual methods of railroad transportation. The contract to carry the baggage of passengers as incident to the contract to carry the person, does not become defined as to the particular baggage, its amount, or other incidents, until the baggage is delivered to the baggage-master. So also in respect to checking baggage, the arrangement, from the nature of the business, must, in large places at least, be made with the baggage-master. It would be impracticable in the city of New York, for example, to arrange the details for the carrying of baggage with the ticket agent. Such details are left, as they necessarily must be, to be subsequently arranged between the passenger and baggage-master at the very time of delivering the baggage. The passenger can ordinarily deal with no one else in respect to them. He may not know, or if he knows, he would not ordinarily be able to find the superior agents of the corporation. The passenger has, we think, the right to assume that the baggage-master possesses the requisite authority to make all ordinary and usual arrangements with passengers in respect to the transportation of baggage. If a question arises as to checking baggage beyond the line of the road receiving it, the practice of the company is presumably known to the baggage-master, and he is practically the only person to whom the inquiry can be addressed. It would produce great inconvenience if it should be held that the baggage-master did not represent the company in respect to the ordinary incidents of baggage transportation. It could not be claimed that a baggage-master, in the absence of special authority, could bind the company by a contract to carry

baggage beyond the terminus of the road, or agree upon special or unusual modes of delivery, as to deliver at a place other than the depot of the company, or (perhaps) to a specified person at the terminus of the route, other than the owner. But it is we think within the apparent scope of a baggage-master's employment, when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the question and to bind the company by checking it over connecting roads. In this case the request to check over the Mobile route was made to the baggage-master and assented to by him, and he assumed to give checks in accordance with the request. This constituted, we think, an agreement binding on the company, and unless the plaintiff's omission to examine the checks was contributory negligence, we are of opinion that the nonsuit was erroneous. The primary purpose of giving a passenger a duplicate check is to enable him to identify and claim his baggage at the end of the route. It has never, we think, been regarded as embodying the contract of carriage, but only as a voucher or token for the purpose mentioned. See *Quimby v. Vanderbilt*, 17 N. Y. 306; *Van Buskirk v. Roberts*, 31 id. 661; *Blossom v. Dodd*, 43 id. 264; 3 Am. Rep. 701; *Rawson v. Penn. R. R. Co.* 48 N. Y. 212. The plaintiff had a right to repose upon the representation of the baggage-master, without examining the checks. It is, however, a conclusive answer in this case to the claim to take the question of contributory negligence from the jury, that an inspection of the checks would not be likely to apprise a person not an expert or familiar with the roads making up the lines from New York to New Orleans, that a mistake had been made. The plaintiff was at least entitled to have the question of negligence on his part submitted to the jury.

For the reasons stated we think the nonsuit was erroneous, and the judgment, therefore, should be reversed, and a new trial ordered.

All concur, except Earl, J., not voting.

Judgment reversed.

Connecting Lines—Baggage.—The reader is referred to the following authorities in connection with the principal case. *Baltimore & Ohio R. R. Co. v. Campbell*, 3 Am. & Eng. R. R. Cas. 246; *Wolff v. Central R. R. Co.*, 6 Am. & Eng. R. R. Cas. 441; *Texas, etc., R. R. Co. v. Fort*, 9 Am. & Eng. R. R. Cas. 892; *Texas, etc., R. R. Co. v. Ferguson*, 9 Am. & Eng. R. R. Cas. 895.

16 A. & E. R. Cas.—18

PIEDMONT MANUFACTURING Co.

v.

COLUMBIA AND GREENVILLE R. R. Co.

19 South Carolina Reports, 353.

A common carrier is responsible to the full extent of his liability as such, notwithstanding any contract he may make with reference thereto; but one not a common carrier may make any lawful contract which the parties choose.

The true test of a common carrier is: Is it optional with him whether he will carry or not, or is it his legal duty to carry for all alike? If the latter, he is a common carrier; if the former, he is not.

A company chartered and organized for railroad transportation is a common carrier over its own line, but it is not so beyond its termini and over connecting lines unless it has become so by usage, character of business, or contract.

The payment of freight and passenger fare through to points beyond the termini of a railroad does not make it a common carrier over other roads to the point of destination.

The duty or obligation to convey the goods beyond its own line of road, and to deliver them at a point beyond its own line, is not imposed by law, but depends upon the contract between the shipper and the company.

The bill of lading is the contract between the shipper and the company by which the company agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties.

The signature of the shipper is not necessary to establish his assent to the terms of a bill of lading.

It is the duty of the judge to construe a written contract, but where there is dispute as to which of two agreements the parties acted under, that is an issue of fact which it is the province of the jury to determine.

Letters from the president of a railroad company, written after the destruction of goods by fire, admitting the liability of his company therefor, are not evidence against the corporation in an action brought to recover for such loss.

In his dissenting opinion Mr. Justice McGowan makes a full statement of the case, as follows:

In the case first named in the title, the plaintiff corporation brought an action against the defendant corporation for \$240, the value of three bales of domestics, shipped by the former at their factory in Greenville, upon the railroad of the defendant, to be carried by its own and connecting lines to Baltimore, in the State of Maryland, and there safely delivered to Woodward, Baldwin & Norris, for freight, at the rate of fifty-six cents per one hundred pounds. The allegation was that the defendant corporation did not safely carry and deliver the goods pursuant to agreement, but, on the contrary, the defendant and connecting lines so negligently acted in regard to the same, in their calling as carriers, that said goods were lost and never delivered. The defendant corporation

made several defences: First, they denied the contract as alleged. Second, that there was any negligence on their part, as they delivered the goods to the Charlotte, Columbia and Augusta R. R. at Columbia, and that their liability ended with such delivery. And third, that they received the goods under a special contract, exempting them and all connecting lines from liability for loss by fire, and if there was any liability it should fall only on that line in whose actual custody the property was at the time of the loss; and that the said three bales of domestics were destroyed by fire while in transit, viz.: at West Point, Virginia, on board the steamer Shirley, belonging to the Baltimore, Richmond, and Chesapeake Steamboat Co.

The second case named was for \$1600, the value of twenty bales of domestics, shipped at the same time and under the same circumstances to Woodward, Baldwin & Co., New York. These bales were destroyed at the same time and place and by the same fire, there being no difference in the facts except that the three bales were actually on board the steamer, and the other twenty were on the wharf when destroyed. The cases on the circuit were considered as similar, and the result in one determined the other. It appeared that Mr. Hammet, president of the Piedmont Manufacturing Co., wishing to ship his fabrics North, met in Columbia the general freight agent of the Columbia and Greenville R. R., and made with him an arrangement for "through rates" to Baltimore, for which the Piedmont Co. was to pay fifty-six cents per one hundred pounds to Baltimore, and sixty cents per one hundred pounds to New York. At that time nothing whatever was said about limiting the liability of the defendant.

Some time afterwards, November 22d, 1880, under this general arrangement, those having charge at Piedmont (Mr. Hammet was absent from the State) sent three bales of domestics to the Piedmont station on the railroad, and delivered them to one W. B. Vaughn, agent of the railroad company at that point, who gave a printed receipt for the same. This paper was headed "Greenville and Columbia R. R., through bill of lading." It acknowledged the receipt of the three bales, "to be transported by the Greenville and Columbia R. R., to Columbia, Greenville, or Seneca City, as the case may be, and thence by connecting lines—same to be delivered in like order and condition—to Woodward, Baldwin & Norris, Baltimore, Maryland."

This paper was not signed by the shipper, but contained in small type "conditions," declaring the railroad companies exempt from liability in many cases stated at length, and among other things as follows: "That the said Greenville and Columbia R. R. and connecting railroads and steamship lines shall not be liable for loss or damage on any article of property whatever, by fire or other casu-

Woodward, Baldwin & Co., New York, the goods lost. Is not that the very contract Mr. Hammet made with the general agent in Columbia? What right had he to alter the terms of that contract, at Piedmont, and attach a release and conditions? None in the world that I can see. There is no proof on that subject, and I regard that bill of lading simply as a receipt to carry out the agreement previously entered into between Mr. Hammet and the general agent of the defendants.

It does not seem unreasonable to hold, that when a shipper entrusts his goods to a common carrier, who stipulates that he will deliver them by connecting line in New York, that he is discharged from liability when he delivers them to the first connecting road on the line of connection. The shipper has made no contract, sent no freights to any other line on the route.

This "through" line, north and east, south and west, was not made for his convenience, but for the benefit of the common carriers comprising the line. It is true, it is a convenience to the shipper; but if, when he makes a contract with the Greenville and Columbia Railroad, he is to place his goods to the Charlotte, Columbia and Augusta Railroad and all the other lines of connection, and can only hold that line liable on which the goods were lost, and with which he made no contract, it has to me very much the appearance of a snare.

Evidently Mr. Hammet thought that when he made his agreement with the general agent to have his goods transported on the connecting lines he represented north and east, west and south, at a stipulated rate of freight which they were to divide, he had a binding contract with the initial road with whom he made the contract, and that the initial road of the connection could not shift its responsibility by any device of releases or conditions in consequence, signed by a local agent at a local station. Is it reasonable, nay, is it just to make the shipper look to any other company than the company with whom he has made the contract? Is it fair, after he has made a contract with the general agent of the combination, in which there was no stipulation whatever, to hold him bound by a printed form, filled with limitations and stipulations, signed by a local agent, to which the shipper has not given his assent by attaching his signature? In all probability, if he went to any other company than the one with whom he made the contract, he would be told, "We made no contract with you; go to the company with whom you contracted."

This war between common carriers and shippers has been going on from time immemorial. Every device that the ingenuity of man can suggest has been adopted to avoid and shift their responsibility. Since the introduction of railroads, so great is their influence that some States have been induced to change the Eng-

lish rule and adopt what Mr. Lawson calls the American rule. That time has not yet arrived in South Carolina, and we still hold to the English rule, the rule of our ancestors, from whom we have borrowed our jurisprudence.

Admit that a corporation is only liable for the loss of goods shipped over its corporate territory. This is good law. But suppose several corporations, in contiguous States, contract to carry "through freights" over their respective roads and connecting lines, and for that purpose appoint a general agent, who receives pay for the freight at the initial point: I hold that the English rule prevails, and the corporation receiving the freight and giving the receipt at the initial point is responsible.

It is true, as was argued, the legislature has given its construction, that the initial road is responsible until it produces the receipt of the connecting road. But that does not apply to the shipper; it applies to the roads forming the combination. The corporation making the loss is liable to the other corporations forming the connecting line; but the shipper only looks to the corporation who received his goods, took his money, and contracted to deliver the freight in New York. If the loss is disputed, who is to sue? Why, the road who gave the bill of lading, and not the shipper. They must adjust their difficulties among themselves, and not put the confiding shipper to the trouble and expense of running from State to State to find out where the goods were lost, how they were destroyed; if it was negligence, or the act of God, or the public enemy; and, perhaps, when he does make the discovery, the corporation may be bankrupt, while the initial company, with whom he had made the contract, is perfectly solvent. I hold such a construction to be unjust and unwarrantable, either by law or reason. My view of the legislative construction is, not that the initial road receiving the goods and giving the bill of lading to the shipper is not relieved from liability to the shipper, but as among the companies composing the corporation or through line, that company making the loss shall bear the whole liability, and not distribute it among them all.

If you determine that the contract was the agreement between Mr. Hammet, president of the Piedmont, and the general agent of the through line at Columbia, and that the bill of lading was a mere receipt in pursuance of that agreement, your verdict will be for the plaintiff for the sum of \$1600, with interest from the first day of December, 1880.

The judge subsequently instructed the jury to include the interest on the amount of damages found, if plaintiff has proved himself entitled to any, but not to find interest *eo nomine*.

The jury found a verdict for plaintiff in both cases. From the judgments entered upon these verdicts the defendant appealed upon the following exceptions:

I. Because his Honor refused to instruct the jury as prayed by the defendants.

(a.) That the legal duty and obligation of the Columbia & Greenville R. R. Co. as common carrier, was only to convey over its own line of road. The corporate franchise and legal duty are commensurate.

(b.) That the duty or obligation to convey the goods beyond its own line of road and to deliver them at a point beyond its own line is not imposed by law, but depends upon the contract between the shipper and the company.

(c.) That the bill of lading is the contract between the shipper and the company, by which the company agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties.

(d.) That by the terms of the contract the Columbia & Greenville R. R. Co. was not to be liable for goods destroyed by fire in transit or at depots and landings or in depots or other places of transshipment. And if the goods in question were destroyed by fire while in transit beyond the line of defendant's road, or while in depot or other place of shipment or transshipment, or while at depots and landings at points of shipment and delivery beyond the line of the defendant's road, then the defendant is not liable and the verdict should be for the Columbia & Greenville R. R. Co.

(e.) That in and by the sixth clause of the contract between plaintiff and defendant, it is stipulated and agreed that in case of loss during transportation whereby legal liability may be incurred by the terms of the contract, that company alone shall be answerable for such loss in whose actual custody the property was at the time of the happening of the loss. And if the jury are satisfied that the goods in question were in the actual custody of some other carrier when burnt, then this defendant is not liable. And under the terms of the contract the action must be against the company in whose actual custody they were when destroyed.

II. Because his honor submitted as the only question for the jury to decide, Who is liable, defendant or some other person?—whereas one of the main questions in the cause was, whether under the bill of lading any one was liable.

III. That the bill of lading was the only contract for the carriage of these goods that was proved, and that his Honor erred in submitting to the jury whether the contract for carriage of these goods was the agreement between Mr. Hammet and the general freight agent, or the bill of lading, signed by the agent of the company when the goods were delivered to the company.

IV. That the plaintiff having put in evidence the bill of lading signed by Vaughn, agent of defendants, no previous parol

agreement could alter or affect the terms of the bill of lading or substitute any other agreement for the contract evidenced by the bill of lading.

V. Because his Honor erred in instructing the jury that the real contract was that made between Mr. Hammet and the general freight agent, and the agent at Piedmont had no right to alter the terms or annex the conditions; and erred in instructing the jury that the bill of lading was simply a receipt to carry out the agreement previously entered into with the general freight agent.

VI. That whether the contract was the contract of the Columbia and Greenville R. R. Co. for the entire carriage or the contract of each successive line, the exceptions in the bill of lading of responsibility for loss by fire at depots, etc., attached to the goods and accompanied them from Piedmont to their destination. That this is the English, as well as the American doctrine, and that his Honor erred in ruling to the contrary.

VII. That his Honor erred in holding that the signature of the shipper was necessary to establish his assent to the terms of the bill of lading.

VIII. That the act of the legislature of 1882, does require shipper to go from road to road, until he finds the party in default. And that his Honor erred in ruling to the contrary.

IX. That his Honor erred in admitting the letters of President McCaughrin. That the liability of defendants was a legal question to be determined by the courts, and the declarations or opinions of the president after the loss are not admissible to impose liability on defendants.

Conner & Cheves for appellant.

Wells & Orr, T. Q. Donaldson, contra.

SIMPSON, C. J.—In November, 1880, the plaintiff delivered to the defendant at Piedmont station, Greenville county, twenty bales of domestics, to be transported to Woodward, Baldwin & Co., at New York, and at the same time and place three bales for Woodward, Baldwin & Norris, at Baltimore. The bill of lading given by the defendant will be found in the brief. It contains a stipulation, that, in case of loss, "the company in whose actual custody the property was at the time of the loss should be answerable." Also an exemption for loss by fire. The twenty bales were destroyed by fire in transit on the wharf at West Point, Va., and the three bales at the same place on board the steamer Shirley, lying at the wharf. This action was brought to recover damages for the loss of these goods.

The defendant relied upon the exemption in the bill of lading as to fire—that being one of the excepted perils in said bill—and also upon the stipulation as to the liability of the company actually in custody. Two actions were brought below, but as the facts

and principles involved were substantially the same in both, it was agreed that the result of the trial in one should determine the other. The jury found for the plaintiff in both cases. The defendant has appealed.

It is admitted that common carriers in this State cannot limit their common law responsibility by any notice or declaration or special contract for or in respect of any goods to be carried by them. This was specially provided by act of legislature (Gen. Stat., 1872, p. 336), of force at the time of this loss. The first and prominent question, therefore, in the case is, Was the defendant a common carrier as to the goods in question when they were destroyed? If so, then the exemptions in the bill of lading (supposing that to contain the contract) would not avail. If, however, the defendant did not sustain the relation of common carrier as to these goods at the time of their destruction, then, upon equally as well-settled principles as the above, its liability would depend upon the terms of the contract by which the company undertook to ship the goods beyond the terminus of its own line. In other words, the law is, that a common carrier is responsible to the full extent of his common carrier liability, notwithstanding any contract he may make with reference thereto as to all goods, etc., to which he sustains the relation of common carrier; while, on the other hand, one who is not a common carrier may make any contract for transportation which the parties choose, not contrary to law. *Railroad Co. v. Pratt*, 22 Wall. 129; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 324.

The true test of the character of a party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it is his legal duty to carry for all alike, who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the States, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them. While the law has imposed duties and heavy responsibilities upon common carriers, which they cannot avoid, limit or shake off, yet it has never attempted to hamper and surround those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case.

Now the important question arises: Was the defendant a common carrier with reference to the goods in question? The defendant is a corporation created under an act of the legislature,

and was formed and organized for railroad transportation between certain points in this State, and as to this railroad and between these points it is certainly a common carrier in the full sense of that term, subject to all the laws and principles, statutory and otherwise, which have been established in this State in reference to common carriers. And if this loss had occurred between the termini of the road there would be no difficulty in the case. In fact, in that event, we suppose the case would not have been here.

It is equally as certain that, so far as the charter of the company is concerned, under its provisions this corporation is not a common carrier beyond its own termini, there being no legal duty imposed to receive and transport goods beyond those points. It would seem to follow then, from these principles, that if liability has attached to the company it must be either because the said company has become a common carrier beyond its termini and over the connecting lines by usage, its character of business, or by contract, express or implied; or it has become liable in this special case by a special contract covering the case.

There is no foundation for the first position; in fact, it has not been urged in the argument that this company has become generally a common carrier outside and beyond the limits of its charter and over its connecting lines, and that it is legally bound to transport goods to any point beyond its line as may be designated by the shipper. It is true that the destination of the passengers embarking on this road, and of the goods shipped thereon, is frequently beyond its own termini, and at points reached only by connecting roads; but this fact cannot, nor does the payment and receipt of the fare and freight through to the destination, which is as much for the convenience of the traveller and shipper as for the roads, make the company first concerned *ex vi termini* a common carrier through the whole distance. Such a doctrine would make railroad enterprises a fearful business. It would destroy them utterly, and it finds no place in the books or in reason.

Railroad corporations, however, while being common carriers between their termini, and bound inflexibly by the law on this subject; with no power to alter, amend or limit it as to transportation on their immediate line, may yet contract to deliver consignments at any point beyond such terminus as may be agreed upon, and this contract may be either absolute or conditional, and when made it is subject to the adjudication of the courts, as all other contracts are. The defendant being a carrier only to the extent of its line under its charter, was not bound to receive and ship the goods of the plaintiff beyond its termini. This was optional, as we have seen, and its liability, therefore, in such cases must depend entirely upon the contract made between the parties. Was it absolute, or was it conditional? And if conditional, did the conditions happen which were to exempt the road?

The complaint charges that in consideration of a certain sum the defendant "agreed safely to carry from Piedmont station to the city of New York, over their connecting lines, and there deliver to Woodward, Baldwin & Co., in good order," the goods in question. This is an allegation of an absolute and unconditional agreement, and, had it been sustained by the evidence, there would have been no escape for the defendants; the case of *Kyle v. Laurens R. R. Co.*, 10 Rich. 382, would have been directly in point. The answer of the defendant puts in a positive denial of the charge in the complaint, and sets up a special and conditional agreement as to the shipment of these special goods. Upon the complaint and answer, the first question before the court below, as it appears to us, was one of fact, and for the jury, to wit: Was the contract absolute and conditional, as alleged in the complaint, or was it, as stated in the answer, subject to conditions and contingencies?

The testimony on this subject on the one side was the evidence of Mr. Hammet, the president of the plaintiff company, where he said generally: "All our arrangements for shipping and through rates were made with the general freight agent of the Columbia and Greenville R. R. Co. at Columbia. We were to pay sixty cents per one hundred pounds freight to New York. No contract as to limiting liability of defendant was made or even alluded to. I was in New England when goods burnt." The evidence of the agreement set up in the answer was the bill of lading given when the goods were received at Piedmont station by W. D. Vaughn, agent of the Columbia and Greenville Co., and signed by him as such agent. This bill of lading, it seems, was given to the plaintiff, and by it forwarded to the consignee in New York.

The judge, in his charge, instructed the jury that the agreement between the parties was the one detailed in the testimony of Mr. Hammet; that this agreement was unconditional and had no limited liability attached; that the agent, Vaughn, had no right to alter the terms of this contract and attach conditions, and that, in his judgment, the bill of lading was simply a receipt to carry out the agreement previously entered into between Mr. Hammet and the general agent of the defendants.

We think this charge was erroneous. It is true that it is the province of the judge to construe agreements and extract their meaning, but it is first the province of the jury to determine what agreement has been made. Here, it seems to us, the judge went beyond construction and charged upon facts, the finding of which is alone the province of the jury. The charge in this respect is subject to the fifth exception of defendant. It is not for this court to adjudge or indicate what the precise agreement between the parties was. This, as we have said, is a question of fact for the jury, and the jury should have been left untrammelled in the duty

of determining the fact ; and as, in our opinion, they were not so left, the cases must go back on this ground if no other.

But, even supposing that the evidence of Mr. Hammet is the controlling testimony in the case, and that he detailed truthfully what occurred between himself and the general agent (of which there is no doubt), yet we think it was error of law in the Circuit judge to hold that that agreement amounted to an unconditional contract on the part of the defendants to transport and deliver at all times and to all points whatever goods the plaintiffs might ship over the road of the defendant to some destination by connecting lines beyond its termini, and that the agent of the defendant, who gave the bill of lading, could not alter the terms of this previous contract.

We do not see anything of a positive agreement in the interview between Mr. Hammet and the general agent of Columbia, except as to the rates upon which his goods were to be shipped. He says : "All our arrangements for shipment and through rates were made with the general freight agent of Columbia and Greenville R. R. Co. at Columbia." But what these arrangements were is not specified, except as to the rates. Under such circumstances we do not see why the agent of the company and the plaintiff might not specify the terms and conditions of the shipment, when he came to receive a special consignment. It would certainly not be illegal for the shipper and the agent at that time to include in the bill of lading such stipulations as might be agreed upon. Whether both parties consented and agreed upon the stipulations, or understood them alike, might be a question dependent upon the facts, but that they would have the right to insert such as they deemed proper, there could be no question. The error of the charge was, that the Circuit judge assumed that the stipulations found therein were inserted by the agent of defendant without the knowledge and consent of the plaintiff. This we think was a question of fact, and should have been left to the jury.

The legal propositions mainly relied on and earnestly pressed by the respondent's counsel, need not be nor can they be successfully contested. They are sustained by abundant authority. "Where a carrier undertakes, without more, to transport beyond its own line, the liability attaching at the commencement will continue throughout the transit to destination ; all connecting lines of carriers employed in furthering and completing such transportation become the agents of the first carrier, and for their defaults he becomes responsible to the owner of the goods."

We need not go behind *Kyle v. Laurens R. R. Co.*, 10 Rich. 382, for support to this proposition. There the Laurens Railroad undertook to deliver cotton in Charleston. The cotton was burnt on a connecting road. The Laurens road was held responsible, and why ? Because its contract had been breached ; it

failed to deliver in Charleston; the court did not hold that the Laurens Railroad was a common carrier as to this cotton, and upon that ground liable for its loss, but that it had contracted to do what it had failed to do, and therefore was liable. And here, if it had appeared as a fact found by the jury, that the defendant had made a contract which, upon a legal construction, was without conditions and absolute, then the defendant would be responsible upon the same principle as in *Kyle v. Railroad Co.*, *supra*.

The respondent further contends, that a common carrier cannot generally limit his liability by a special agreement. And in no event can he shield himself from the consequences of negligence or misconduct by an unconditional exemption from certain perils as fire, etc. This, too, he sustains by abundant authority. But it seems to be overlooked in the application which is sought to be made of these principles on behalf of the respondent, that they apply to common carriers and to common carriers alone; that they have no reference to others who may happen to transport goods at a certain time and place, when and where they are under no legal obligation to do this work, but have assumed it voluntarily, perhaps as much for the convenience as otherwise of the owner of the goods. It is conceded that they do have reference to common carriers; those who have undertaken the business of a common carrier either as a chartered company or otherwise, but we fail to see their application to the other class suggested.

The argument of respondent, it appears to us, has assumed the real point at issue, to wit: that defendant, as to the goods in question, was a common carrier. We do not think that the defendant was a common carrier beyond its termini under its charter. We hold that there was no legal duty on it to deliver goods beyond its line; that it might contract to do so, however, according to such terms as might be agreed upon between it and the shipper. This agreement might be either absolute or conditional. It might make the company substantially a common carrier, and therefore subject it to all the rules and principles contended for by the respondent, or it might contain limitation and restriction far short of this. But, whatever may be the contract in a given case, is a question of fact for the jury, which, when found and properly construed, must become the law of the case.

There is really no great difference between the English and American doctrine on this subject. The one holds that, to exempt a carrier from liability beyond its terminus there must be a special contract to that end. The other, that to make the first carrier responsible there must be a special contract to that end. Both admit that the carrier is not bound to go beyond the terminus, but that he may do so; and if he undertakes to do so he is bound by his undertaking. In the one case, if the contract contains no exemption it is absolute; in the other, if the conditions are specified

they must govern. This is nothing more than saying that the whole thing is per contract, and that whatever the contract is that must be enforced—the legal construction being, that in the one case, in the absence of exemptions, the carrier has contracted, unconditionally, to deliver; the other, with conditions inserted, they must control. But if there be a difference, that difference is immaterial here, because both parties claim a contract—the plaintiff an unconditional contract made with Mr. Hammet, and the defendant a conditional one made by Vaughn and accepted by the plaintiff in the receipt of the bill of lading. So at last, as we have said, the case hinges in the first instance upon a question of fact.

The principles announced in the leading case referred to by respondent's counsel (*Railroad Co. v. Lockwood*, 17 Wall. 357), do not conflict with those above. The court in this case, as is said in the argument, after a most careful examination of the principal authorities, both English and American, reached the conclusion, as announced in its opinion: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly, that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for negligence of himself and servants. Thirdly, that these rules apply both to carriers of goods and carriers of passengers, and with special force to the latter."

These, no doubt, are all sound conclusions, and are not only well sustained by authority, but are founded on justice and wisdom, when applied, as this case evidently intended they should be, to the business of common carriers acting within their sphere—which business, in this day, has assumed such important and immense proportions. There is not a word, however, in this case, or in the conclusions announced, which make these principles applicable to one who is not a common carrier, or denies to such one the privilege and right to contract for himself. It must not be taken for granted that, because one is a common carrier between certain points, that he is also a common carrier beyond those points, and then apply the principles which have been established in reference to common carriers to him, both within and beyond his lines.

This distinction, it appears to us, has not been clearly observed in this case. Hence we think that many of the authorities cited are not applicable. In *Railroad Co. v. Lockwood*, *supra*, Mr. Justice Bradley, drawing the true distinction, said: "A common carrier may undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to convey something which it is not his business to convey. . . . In such case such agreement might be made in reference to his taking and conveying the same, as the parties chose

to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

Neither is there any conflict between the principles herein, and the well-considered case from New Hampshire, where the court held that where several common carriers are associated in a continuous line, one price for through freight being received by the initial company, the goods being marked and received to be delivered at a distant point beyond the termini of such initial company, that in such case the initial company is bound to carry them or see that they are carried to their final destination, and is liable for loss happening at any point along the line. *Nashua Lock Co. v. The Worcester and Nashua R. R. Co.*, 48 N. H. 339. That was upon the ground that from the facts mentioned, and nothing more, the court would conclude in accordance with the English doctrine, that the contract to deliver in that case was not an absolute contract to deliver at the point mentioned, and, of course, should be enforced as made by the parties. But there is nothing in that case which even intimates the idea that the initial company was bound to receive the goods, whether it wished to do so or not, or that the parties could not make a contract with stipulations if they saw proper to do so. That case is authority for the position that, where the initial company receives the goods, marked, and to be delivered to a distant point, with the freight paid to that point, and no stipulations are made to the contrary, the contract is absolute. It decides nothing more, and it is in accord with *Kyle v. Laurens R. R. Co.*, *supra*, but not at all in conflict with the positions taken hereinabove.

We think the charge of his Honor is subject to exception first and the specifications (b) and (c) thereunder, in that he declined so to charge. The other specifications under this exception assume a question of fact which the judge was not authorized to assume. These cannot be sustained.

Exceptions third, fourth and sixth are overruled. The third because the request is based on an assumption of fact, to wit: that the bill of lading was the contract. This, as we have seen, was a question of fact for the jury and could not be assumed by the judge. The fourth claims that no previous agreement could alter the terms of the bill of lading. This would be true if the bill of lading constituted the contract, but that was the very question at issue. The sixth called upon the judge to charge that "whether the contract was the contract of the Columbia and Greenville Co. or the contract of each successive line, yet that the exemption from the peril from fire attached to the goods all through." Each successive

company was certainly a common carrier along its line, and while the goods were on each line, the common law liability of a common carrier, with all its absolute force, attached, and exemptions could not be made by which the company in possession could divest itself of the character of a common carrier; hence, the judge could not have charged this request.

Exceptions second, fifth, seventh and ninth are sustained.

Exception eighth we do not consider in the case. The exceptions have not been set out in full in this opinion, as this would have encumbered it too much. It is to be hoped that the reporter, in giving a statement of the case, will set them out.

Next and last, as to the admissibility of the letters of McCaughrin, the president of the defendant company. These letters were the written declaration of an agent, and their admissibility must depend upon the rules of evidence in such cases. These rules would allow such declarations when constituting a part of the *res gestæ*, or when made within the scope of the agency, but declarations made some time after the act and beyond the scope of the agency should not be allowed. The letters contained an admission by the president of the liability of his company, or rather the expression of a legal opinion to that effect, and they were written some time after the controversy began. We do not think that this opinion was within the scope of the agency of the president, nor its expression a part of the *res gestæ*. They were, therefore, inadmissible. Had they contained an admission of some fact connected with the contract, it would have been otherwise.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

McGOWAN, J., dissenting.—In these cases I cannot concur in the judgment of my brethren for the reasons herein stated. [Here follows his statement of the case.] We will not follow the exceptions, but endeavor to dispose of the questions as they arise in order. First, as to the contract between the parties. The exceptions charge in various forms that it was error to leave it to the jury to decide what was the contract between the parties; that the only contract was the printed bill of lading; that all previous verbal negotiations upon the subject were absorbed into that, which became the only contract between the parties.

We believe it is the general rule in such cases where there have been no previous negotiations, to consider the bill of lading, although not signed by the shipper, given on one side and accepted by the other, as the contract of the parties. But when there has been a previous general engagement on the subject, the question often arises whether the shipment was made on the terms of the bill of lading or upon the faith of the previous arrangement. The rule of evidence is that "Parol contemporaneous evidence is inadmissi-

ble to contradict or vary the terms of a valid written instrument, . . . but the rule is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any existence or binding force either by reason of fraud or for want of due execution, or for the illegality of the subject-matter." 1 Greenl. Evid. § 248.

In this case the plaintiffs denied that they had ever accepted the terms proposed in the printed receipt, which was not signed by them, or made any such contract, but, on the contrary, insisted that the only agreement they had made was that made in Columbia by President Hammet with the general freight agent of the defendant corporation, in which nothing was said about limiting liabilities, but was as follows: "We shipped goods on November 22d, 1880, to Woodward, Baldwin & Norris; were delivered on that day at Piedmont to be carried to Baltimore. All our arrangements for shipment and through rates were made with the general freight agent of Columbia & Greenville R. R. Co. We were to pay fifty-six cents for one hundred pounds of freight to Baltimore. No contract as to limiting liability of defendant was made or ever alluded to." They insisted that upon the faith of this agreement alone they had shipped the domestics in question, and the defendant corporation could not at the last moment, after the property had been actually delivered, interpolate upon that contract new terms and conditions never submitted before nor agreed to by them.

The question as presented was not as to altering the terms of a written agreement, but whether the paper contained a contract at all. It certainly requires two to make a contract. It is elementary "that in order to constitute a binding contract there must be a definite promise by the party charged, accepted by the person claiming the benefit of such promise. There must be a request on one side and an assent on the other. No contract is raised by a mere ex parte affirmation in discourse, a mere assertion, or offer to enter into an agreement not expressly and absolutely assented to by both parties." Chit. Cont. 9. Both parties must assent in the same sense. If the printed bill of lading had been before Hammet and the agent in Columbia when they made the general arrangement, and its terms had been agreed to, then it would have been the written contract of the parties beyond the reach of alteration by parol evidence, and to be construed by the judge alone. But whether the various stipulations in the receipt were ever agreed to and became the contract of the parties was a very different question.

It is true that the bill of lading seems to have been offered in evidence by the plaintiffs, probably because it contained the receipt of the defendant for the property; but it does not follow that they are bound by the numerous conditions, exceptions and alleged agreements therein. Ordinarily a receipt is only evidence of a

single fact, the closing fact of a transaction, and the act of but one of the parties. We would not expect to find in it original terms and conditions stated as agreed to by two contracting parties. "A receipt in itself does not express the terms of any contract or writing of the words of the parties between whom it has passed, but merely evidences, by way of admission, the fact stated in it, consequently it is not governed by the rules which prescribe the effect of instruments adopted by parties as the special means of evidencing some compact or understanding had between them, but like evidence not enjoying any special privilege, is capable of being contradicted or modified by other classes of evidence." *Heath v. Steele*, 9 S. C. 92.

It could not be assumed conclusively that the Piedmont Co. had agreed to the terms of the receipt, only because it was retained by the person, possibly a mere employee, who delivered the property at the depot. *Whiting v. Sullivan*, 7 Mass. 107; *Bostwick v. Railroad Co.*, 45 N. Y. 712; *Hutchinson on Common Carriers*, § 238, and *Lawson on Contracts of Carriers*, § 101. It seems to me that the point is fairly stated by Mr. Lawson at page 138, when he says: "When the shipper of goods, who has previously entered into an oral agreement with a common carrier, takes a receipt for the same, he has a right to assume, in the absence of notice to the contrary, that his agreement is embraced in the paper, or at least that his receipt contains nothing to the contrary, and that it is in the nature of a fraud on the part of a carrier, having entered into such oral agreement, to insert in the receipt a contract of an entirely different character and present it to the shipper without calling his attention to it or getting his assent." The question of what was the contract, whether the general agreement in Columbia, or the paper handed to the servant when the bales were delivered at the depot, was one of fact, and I cannot say that the judge erred in submitting it to the jury.

Assuming then, as we may do, that the jury found that the conditions expressed in the printed bill of lading were never agreed to by the Piedmont Co., but that the bales of domestics marked for Baltimore were sent to the depot under the general arrangement entered into by the president at Columbia, the verdict might be rested on that alone and go no further. In this view the defendant corporation undertook to transport the property to Baltimore; in the words of Mr. Hammet, that it was to be "carried to Baltimore" and there delivered to Woodward, Baldwin & Norris, to whom the bales were directed. This arrangement was made with the defendant corporation alone, without any reference to the means by which it was to be done or limitation as to responsibility. There was no privity of contract with any other company whatever. So far as appears, the defendant corporation or its agent had no authority to make a contract binding upon interme-

diate companies for their respective shares of the service to be rendered; but they, without any reference to any such agencies, undertook themselves to give through transportation, to do or have done the whole work and to deliver in Baltimore, thereby, as I think, making for that purpose and to that extent, all connecting lines their agents, or, as it were, extending their own road to Baltimore. If their own track did not actually extend to Baltimore, they, nevertheless, undertook the business through to that point and received pay for it, and they cannot now be permitted to disclaim their own contract or escape the liabilities incident to it.

If time permitted I might review the numerous authorities upon the subject, but we can only deal with conclusions. After much discussion and some difference of opinion, we regard the law as properly held, both on principles of justice and the preponderance of authority, in the well-considered case of *The Nashua Lock Co. v. The Worcester and Nashua R. R. Co.*, 48 N. H. 339, where, after a full review of the authorities, it was held that, "When several common carriers are associated in a continuous line of transportation, and in the course of the business goods are carried through the connected lines for one price, under an agreement by which the freight money is divided among the associated carriers in proportion fixed by the agreement; if the carrier at one end of the line receives goods to be transported through, marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them or see that they are carried to their final destination, and is liable for an accidental loss happening at any part of the connected line."

I refer to this case for the authorities cited, and the reasons upon which the doctrine is based. This New Hampshire case was much stronger than the one in hand. There the initial company was held liable for doing nothing more than receiving and transporting the goods marked to be delivered at a point beyond their own road. Here this was done, but there was also an agreement that the goods should "be carried to Baltimore;" that is, delivered in Baltimore. Upon this very point as to what shall be regarded as sufficient evidence of an undertaking to transport through, there has been much diversity of opinion in the American courts, which (Mr. Hutchinson informs us at section 148 of his book on Carriers) are about equally divided on the point "whether a carrier receiving goods marked for delivery beyond the end of his line is, in the absence of special agreement, only responsible for safe carriage over his own line and safe delivery to the next carrier." See late Tennessee case of *the Louisville and Nashville R. R. Co. v. Weaver*, 9 Lea, 39 and 42 Am. Rep. 655, and *infra*. I believe that when the company receiving the goods is known to be one of a continuous line of associated companies, and there was, as here, a

special agreement of the initial company to transport through, there has never been a doubt expressed in any court.

It is, however, earnestly urged on the other side that the defendant corporation was a common carrier by law only as to their own road, and that their duties should be correlative to their rights and not beyond; that as to so much of the Columbia agreement as was to be performed beyond Columbia, the company must be considered as an individual undertaking to transport certain bales of goods for hire, which single transaction would not make him a common carrier or subject to the rigorous liability imposed upon carriers. The obvious answer to this is that the defendant corporation, when they agreed to transport these goods, was already a common carrier all the way to Baltimore, by virtue of their being engaged with the associated lines in the regular business of through transportation to that point.

The transportation of the few bales of domestics in this case was not a single, isolated act for accommodation or compensation, but one of the acts done in the course of through business, in which they were regularly engaged. It appeared that they canvassed for through business, had arranged the price for which they could do it, and prepared a most elaborate through-receipt. As Mr. Hammet proved, they were at that time engaged in extensive through business "shipping over these routes." As I understand it, common carriers are not limited to those created by charter, but may become such by virtue of their occupation. *Railroad Co. v. Lockwood*, 17 Wall. 357. Mr. Tomlinson, in his Law Dictionary, says: "All persons carrying goods for hire, as masters and owners of ships, lightermen, stage coachmen and the like, come under the denomination of common carriers." In the case of *Clarke v. Swearingen*, 6 S. C. 292, Mr. Swearingen was treated as a common carrier for the reason that during the winter months he was engaged in the business of boating cotton for hire down the Savannah river to Augusta.

The Greenville Co. were common carriers to the extent of their road by charter, and beyond that by virtue of being engaged in the business of through transportation. Their liability as common carriers should not be measured by the length of their road, but by the extent of their undertakings in their business of through transportation either by themselves or in connection with other associated lines. We think there was competent evidence before the jury that the company undertook to carry this property to Baltimore, and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendant, for whose fault they are responsible. *Railroad Co. v. Pratt* 23 Wall. 138. A man who owns a private ferry may make himself a common carrier if he undertake to carry for hire all

persons indifferently. *Littlejohn v. Jones*, 2 McMull. 368. And this is a question of fact to be determined by the jury. *Ibid.*

The law is so well stated in the case from Tennessee (as late as 1882) above cited, that I will venture to make a somewhat long quotation: "It is well settled that a railroad company, as a common carrier, may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at that point, and that the liability thus attaching at the commencement, will continue throughout the whole transit, all connecting lines of carriers employed in furthering and completing such transportation, becoming its agents, for whose defaults it is responsible. *Railroad v. Stockard*, 11 Heisk. 568; *Hutch. Carr.*, § 145. But the courts are not in accord as to what will, *prima facie*, constitute such a contract.

"In England the courts from the first adopted the rule, to which they have formally adhered, that when a railroad company, as a common carrier, receives goods directed to a place beyond the terminus of its own line, without limiting its responsibility by express agreement, such receipt of the goods so directed is *prima facie* evidence of an undertaking to carry the goods to the place to which they are directed, and all connecting railroad companies, or other carriers along the route, are merely the agents of the first company. The latter is alone subject to suit for any loss or damage to the goods, the other companies not being responsible to the owner for want of privity of contract. *Muschamp v. Railway Co.* 8 Mees. & W. 421. The rule, founded as it is in common law principles, has much to recommend it by reason of its uniformity and simplicity, and has been found to work well for the comparatively short distances of carriage on the British island. It has been followed by the courts of a number of States in this country, but modified, generally, so as to give an action against the carrying company actually guilty of the wrong out of which the cause of action arises, although not the original contracting company. All of the American courts, perhaps, except it may be those of Georgia, concur in adopting the English rule, with the modification suggested, wherever the contract is clearly a through contract, or the circumstances show that the contracting company has an interest, or partner, or otherwise, in the entire route. *Hutch. Carr.*, § 160. The courts of the State of Georgia seem to have adopted the English rule without qualification. Many of the States have been led to modify the rule, not only in allowing the actually defaulting carrier, other than the first, to be sued, but in the matter of the *prima facie* evidence of a through contract and the burden of proof," etc.

In the case at bar there was no need of resorting to the rule as to *prima facie* proof of the contract; the proof was positive, and besides the circumstances showed most conclusively that the con-

tracting company had an interest in the through transportation "as partner or otherwise." This was properly a question for the jury, and they have so found.

But, suppose we assume that the person who carried the domestics to the depot at Piedmont had the authority to act for the company in receiving the printed receipt with the numerous stipulations embodied therein, and the jury found that to be the only contract between the parties: I incline to think that, even in that case, the verdict should stand. At the time these goods were shipped the act of 1864 was of force in this State. It has since been superseded, but we must consider it in determining the rights of these parties. Section second declared: "That no public notice, or declaration, or special contract shall limit or in any wise affect the liability, at common law, of any railroad company within this State, for or in respect of any goods to be carried and conveyed by them, but such railroad company shall be liable, as at common law, to answer for the loss of or injury to any articles or goods to be carried or conveyed by them, any public notice, declaration, or special contract by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." Rev. Stat. 366.

The defendant corporation was a "railroad company within this State," and, of course, subject to the law, and there can be no doubt that, according to its terms, the exemptions from liability inserted in the bill of lading, were void and of no effect so far as they concerned transportation on the track of the Greenville & Columbia R. R. Co. proper. But it is insisted that the liabilities of the company must be limited to their own road; that not being carriers beyond, they were not compelled to take the business, and if they did so they had the right to attach their own conditions, and the provisions of the act did not apply to any agreement to transport beyond Columbia.

This might be so if this had been a single act of transportation, undertaken by contract for the accommodation of the Piedmont Co. but we have already endeavored to show that, by engaging in the business, they had previously acquired the character of a common carrier as to the through transportation, and must be held to an accountability as such. If so, was not a contract as to that business as much under the inhibitions of the act as business upon their own rails? It has been decided in this State that the agreement of a railroad company to deliver articles at a point beyond the terminus of their own road, made them liable as carriers until the point was reached and the articles delivered. *Kyle v. Laurens R. R. Co.*, 10 Rich. 382; *Hutch. Carr.*

In the case of *Kyle*, the plaintiff shipped cotton on the Laurens R. R. to be delivered in Charleston; two other roads had to be used in reaching Charleston; part of the cotton was lost after

it left the lower terminus of the Laurens road, and yet it was held that the Laurens Co. was liable for the loss, "their undertaking being special to deliver in Charleston." That is to say, their contract as carriers extended beyond their own road to the point of delivery.

But it is said while that may be so as to roads within the State, the principle does not apply and our State law did not reach transportation on railroads beyond the limits of the State. I do not understand why not. I do not see why the South Carolina law which applies to railroads in the State, should not apply to them as well while running the road of another company beyond this State. In either case one carrier is using the road of another carrier in doing carrier business. Both are carriers and it would seem that the one which undertakes to transport the property should be subject to the law applicable to common carriers in the State where it is located, and the contract is made. The contract was an entirety for the whole distance, made in the State, to be paid in the State, and to a corporation of the State, and I suppose the fact that the property was to be carried beyond the State through other associated lines, could not change the rule which requires that a contract shall be construed according to the *lex loci contractus*. *McDaniel v. Railroad*, 24 Iowa, 412; *Cantu v. Bennett*, 39 Texas, 303.

It is not, however, necessary to affirm anything upon this point. If we assume that the special law of this State, declaring null efforts to restrict liability in certain cases, did not apply to so much of the printed receipt as stipulated to transport beyond her borders, still, as I suppose, the defendant corporation being a common carrier quoad the through transportation was amenable to the general law upon the subject of the liability of carriers; which, while it allows parties to limit their liability by special contract, does not allow such limitations as will destroy the character of the parties as common carriers.

For many good reasons the law is very watchful of the rights of shippers. The general doctrine, as I understand it, is laid down in 2 Greenl. Evid. 260: "If the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exceptions, but also that there was on his part no negligence or want of due care." See *Singleton v. Hilliard*, 1 Strobb. 203; *Swindler v. Hilliard & Brooks*, 2 Rich. 302; *Baker v. Brinson*, 9 Rich. 201; *Railroad Co. v. Lockwood*, *supra*; *Hutchinson on Carriers*, § 260. The last named authority, at the section given, says: "That the weight of authority in this country is in favor of excluding negligence altogether as an element of contract between the carrier and his employer and of holding the former to a rigid account-

ability for every degree of negligence, without the power by contract or in any other mode to divest himself of it."

In the case of *Swindler v. Hilliard*, supra, the defendants had a steamboat running between Charlestown and Columbia. They received cotton in Columbia and gave a bill of lading with these words incorporated into it, "Damages of fire and navigation only excepted." The cotton was burnt on the boat, and it was held, "That carriers can not by any special contract exempt themselves from liability for losses arising from negligence, and when there is a special acceptance the onus of showing not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, lies on the carrier."

In the case from the Supreme Court of the United States, supra, after exhaustive consideration of the whole subject and a careful examination of the authorities, it was held, "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; and second, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

I conclude, even if the printed receipt constituted the only contract between the parties, that the defendant corporation having assumed the business of a common carrier as to the through transportation, and received the property addressed to Baltimore, was bound, notwithstanding the stipulations of exemption, to carry out the main undertaking therein, "to transport to Columbia, and thence by connecting lines to Baltimore." The law will not allow parties to do the business of common carriers and to receive pay as common carriers and at the same time to renounce all responsibility as common carriers. The onus was upon the defendant corporation to show that the property was not destroyed through negligence, which they did not do.

In the language of Judge Withers, in the case of *Baker v. Brinson*, supra: "Whilst in this State we recognize the doctrine that a carrier may limit by special contract his common law liabilities, there is not the slightest disposition further to modify the rules justly applicable to such transactions. Learned judges in England and America have regretted the recognition of such exceptions. Notwithstanding their apparent rigor, there is a salutary policy in these common law doctrines, and those who are called to administer the law must see to it that they are not wholly evaded."

I think the judgment below should be affirmed.

Judgment reversed.

Contract to Transport beyond Company's Line.—In the United States the

weight of authority is to the effect that the mere receipt of goods addressed to a point beyond the line of a railroad company, does not throw upon the company any extra-terminal liability. *Railroad Co. v. Pratt*, 22 Wall. 123; *Inhabitants v. Hall*, 61 Me. 517; *Skinner v. Hall*, 60 Me. 477; *Perkins v. Portland, etc., R. Co.*, 47 Me. 373; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665; *Farmers' & Merch. Bank v. Champlain Trans. Co.*, 16 Vt. 52; *Cutts v. Brainerd*, 42 Vt. 566; *Burrough v. Norwich, etc., R. Co.*, 100 Mass. 26; *Darling v. Boston, etc., R. Co.*, 11 Allen, 295; *Notting v. Connecticut, etc., R. Co.*, 1 Gray, 502; *Elmore v. Naugatuck R. Co.*, 28 Conn. 457; *Hood v. New York, etc., R. Co.*, 22 Conn. 502; *Converse v. Norwich, etc., R. Co.*, 33 Conn. 166; *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 491; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Reed v. U. S. Express Co.*, 48 N. Y. 462; *Condict v. Grand Trunk R. Co.*, 59 N. Y. 500; *Lamb v. Camden & Amboy R. Co.*, 46 N. Y. 271; *Jenneson v. Camden & Amboy R. R. Co.*, 4 Am. L. Reg. 285; *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81; *Baltimore, etc., R. Co. v. Schumacher*, 26 Ind. 168; *Phillips v. North Carolina R. Co.*, 78 N. C. 394; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79; *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376; *Railroad Co. v. Mfg. Co.*, 16 Wall. 318; *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 3 Am. and Eng. R. R. Cas. 260; *Hadd v. U. S. & C. Ex. Co.*, 6 Am. & Eng. R. R. Cas. 443; *Detroit, etc., R. Co. v. McKenzie*, 9 Am. & Eng. R. R. Cas. 15; *Michigan Central R. Co. v. Myrick*, 9 Am. & Eng. R. R. Cas. 25; *Lindley v. Richmond, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 86; *Knight v. Providence, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 90.

But by some authorities it is held that such is the law. *Mulligan v. Illinois Central R. Co.*, 36 Iowa, 181; *Angle v. Mississippi, etc., R. Co.*, 9 Iowa, 487; *Illinois Central R. Co. v. Cowles*, 32 Ill. 116; *Illinois Central R. Co. v. Johnson*, 34 Ill. 389; *Illinois Central R. Co. v. Frankenberg*, 54 Ill. 88; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Milwaukee, etc., R. Co. v. Smith*, 84 Ill. 239; *East Tenn., etc., R. Co. v. Rogers*, 6 Heisk, 143; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk, 253; *Bennett v. Filyan*, 1 Fla. 403; *Lock Co. v. Railroad*, 48 N. H. 339; *Gray v. New Hampshire*, 51 N. H. 9; *Cohen v. Southern Express Co.*, 45 Ga. 148; *East Tenn., etc., R. Co. v. Brumley*, 6 Am. & Eng. R. R. Cas. 356; *Cummins v. Dayton, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 36.

LOUISVILLE AND NASHVILLE R. Co.

v.

WEAVER.

(9 *Lea's Reports, Tennessee*, 38.)

The receipt of goods by a common carrier directed to a place beyond the terminus of the carrier's line, without any limitation of responsibility, is prima facie evidence of an undertaking to carry the goods to the place to which they were directed, and renders the carrier liable for their carriage to that point.

A carrier contracting, without limitation of responsibility, to carry the

baggage of a passenger, and giving a check therefor to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage in the same way and to the same extent as the carrier of goods, although the passenger, whose baggage is thus checked, may purchase and travel upon a coupon ticket.

Where, therefore, the defendant, a common carrier, sold to the plaintiff tickets for herself and family for transportation by railroad from Memphis, Tennessee, to San Francisco, California, each ticket having separate coupons for each carrier over whose road the route lay, and gave plaintiff a check for the carriage of her baggage to Omaha, and a loss of baggage occurred before reaching Omaha but after leaving defendant's own road, the defendant was held liable for the loss.

The plaintiff at San Francisco applied to the railroad companies whose roads lay beyond Omaha for compensation for the loss, and those companies, while denying all liability, made a deduction upon the plaintiff's return tickets over their roads, in consideration of her release of all claim against them for the alleged loss; it was held that neither the payment nor the release affected the liability of the defendant.

APPEAL in error from the Circuit Court of Shelby County.

Estes & Ellett for Railroad Co.

L. B. McFarland for Weaver.

COOPER, J.—The judge of the circuit court tried this case without a jury, and rendered judgment in favor of the plaintiff below, Jane E. Weaver, against the Louisville & Nashville R. R. Co., for the amount claimed for loss of baggage, and the company appealed.

The trial judge found that the plaintiff purchased from the agent of the defendant at Memphis through coupon tickets for herself and family from Memphis, Tennessee, via Milan, St. Louis and Omaha, to San Francisco, California, and started on the trip May 29, 1877; that her baggage was checked by defendant's agents at Memphis from that city to Omaha; that this baggage was delivered in good order, on the same day, by the defendant to the next connecting road at Milan in this State, and that the loss sued for occurred before the plaintiff with her baggage reached Omaha. The judge further found that the plaintiff, upon discovering her loss after she arrived at San Francisco, applied to the Union and Central Pacific R. R. Cos., for compensation for the loss; that the companies denied any liability, but, upon the return trip of the plaintiff in November, allowed her a deduction of between one and two hundred dollars on the cost of transportation over their roads to Omaha, in consideration of her release of all claims against the said Union and Pacific R. R. Cos., for the alleged loss, and that the plaintiff agreed in writing to these terms.

The tickets issued by the defendant to the plaintiff contained a separate coupon for each railroad company over whose road she would pass en route, the defendant's road only extending from Memphis to Milan. Each coupon contained a memorandum that

it was issued by the defendant, the name of the railroad company owning that part of the line, and the names of the places at which that part of the line commenced and ended. The coupons did not purport on their face to be issued by the several companies, nor were they signed with any name. The only signature was that of the general ticket agent at the end of the last coupon. The check given for the baggage was the usual metal check.

The judgment rendered was for the full amount claimed without deduction.

It is well settled that a railroad company, as a common carrier, may contract to carry to a point beyond the terminus of its own line so as to become liable for its delivery at that point, and that the liability thus attaching at the commencement will continue throughout the whole transit, all connecting lines of carriers employed in furthering and completing such transportation becoming its agents, for whose defaults it is responsible. *Railroad v. Stockard*, 11 Heis., 568; *Hutch. on Carriers*, sec. 145. But the courts are not in accord as to what will, *prima facie*, constitute such a contract.

In England the courts from the first adopted the rule, to which they have firmly adhered, that where a railroad company, as a common carrier, receives goods directed to a place beyond the terminus of its own line, without limiting its responsibility by express agreement, such receipt of the goods, so directed, is *prima facie* evidence of an undertaking to carry the goods to the place to which they are directed, and all connecting railroad companies or other carriers along the route are merely the agents of the first company. The latter is alone subject to suit for any loss or damage to the goods, the other companies not being responsible to the owner for want of privity of contract. *Muschamp v. Ry. Co.*, 8 M. & W., 421. The same rule has been applied to a through contract for the carriage of a passenger and his baggage. *Mytton v. Ry. Co.*, 4 H. & N., 415.

The rule, founded as it is on common law principles, has much to recommend it by reason of its uniformity and simplicity, and has been found to work well for the comparatively short distances of carriage in the British island. It has been followed by the courts of a number of States in this country, but modified generally so as to give an action against the carrying company actually guilty of the wrong out of which the cause of action arises, although not the original contracting company. All of the American courts, perhaps, except it may be of Georgia, concur in adopting the English rule, with the modification suggested whenever the contract is clearly a through contract, or the circumstances show that the contracting company has an interest, as partner or otherwise, in the entire route. *Hutch. on Carriers*, sec. 160. The courts of the State of Georgia seem to have adopted the English

rule without qualification. Many of the State courts have been led to modify the rule not only in allowing the actually defaulting carrier, other than the first, to be sued, but in the matter of the *prima facie* evidence of a through contract and the burden of proof. The reason of the latter modification may, probably, be found in the greater distances of carriage in this country and the larger number of connecting lines. Another cause for the change of the burden of proof may be also found in the form of through ticket, known as the coupon ticket, used by our roads.

The question has been before this court on several occasions. In the earliest of the cases, the suit was brought by a passenger against the first carrier for the failure of the second carrier to comply with the contract. The defendants sold to the plaintiff a through ticket from Nashville to Memphis. The defendants were the proprietors of a stage line for the first part of the route. Another company owned the residue of the stage line to the point where it connected with the Memphis & Charleston R. R., which ran thence to Memphis. By an arrangement between these three parties, it was agreed that passengers might pay the whole fare at either end of the line, and receive a through ticket. There was no proof to show that the plaintiff knew of the arrangement between the carriers. "We think," says Harris, J., who delivers the opinion of the court, "that when the defendants received the plaintiff's money and gave him a through ticket, they thereby became bound for his transportation on the entire line, and that he was entitled to a strict performance by the defendants of their undertaking, or to recover compensation in damages for any breach thereof. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that agreement, nor was he bound to look to any person for the performance of the defendants' undertaking but themselves. If either party was guilty of a breach, that was a matter for adjustment between themselves. By the arrangement, the proprietors at each end of the line were authorized to receive the fare and give through tickets to show that they had undertaken and received pay for the transportation of the passenger over the entire line, and the proprietors of the other portions of the line were their agents, whom they trusted to perform that part of the contract which lay on that portion of the line owned by them. If this view of the subject be correct, and we think it is, then it was wholly immaterial whether the plaintiff knew of this arrangement or not. If the defendants, when they sold plaintiff the ticket, intended that he should risk the proprietors of the other portions of the line to carry him through, then they should have so stipulated, and informed him frankly of this arrangement, so that he might, with full knowledge of the facts, have elected whether he would pay

the entire fare and take through tickets, or pay them only for that portion of the line of which they were the proprietors, and make his own arrangements for the balance of the journey. They assumed, however, to carry him through, and are responsible for the undertaking." *Carter v. Peck*, 4 Sneed, 203.

In the case of the *East Tennessee & Virginia R. R. Co. v. Nelson*, 1 Cold. 276, the suit was for the failure on the part of the railroad company to transport wheat, shipped to New York, in due time, under a special contract. "If," says the court, "the carrier, or his servant within the scope of his employment, enter into any special contract to deliver in any particular time and place, even beyond the terminus of his particular route, it will be binding."

In the case of the *East Tennessee & Virginia R. R. Co. v. Rogers*, 6 Heis. 143, the plaintiff shipped freight at Chattanooga to Atlanta, Georgia, taking a receipt from defendant of the delivery of the articles "to be forwarded" by the *East Tennessee & Georgia R. R.*, subject to freight and the regulations of the company. The articles, consisting of provisions, were spoiled and rendered valueless by the negligent detention of the agents of a connecting road. A recovery against the first company was sustained. Judge Freeman, who delivers the opinion of the court, notices the conflict between the English and American rulings, and cites the previous decisions of this court. "These cases," he says, "follow the principles of the English decisions, and we think lay down the sounder doctrine on the subject." The rule adopted is that a carrier, by simply taking charge of goods delivered to him for carriage, marked and destined to a particular place beyond the terminus of his own road, without an express limitation of his responsibility, and a fortiori if he undertakes in terms to deliver, which is the meaning of the words "to be forwarded," is bound to deliver at the place in due time. "It would," adds the judge, "seriously incommode the business of the country if, when property is shipped by one road and must pass over more than this road in order to reach its destination, the shipper, in case of injury to his goods, is to inquire how many routes, and how many different companies make up the line between the place of shipment and delivery, or to determine at his peril which company is liable for the injury."

In the subsequent case at the same term of the *Western & Atlantic R. R. Co. v. McElwee*, 6 Heis. 208, the charge of the trial judge in accordance with the rulings in the previous cases was sustained. Judge Freeman, who delivers the opinion of the court, again reviews the conflicting decisions, and after expressing the opinion that the tendency of the later American rulings is in favor of the English rule, adds that the case of *Carter v. Peck* "is an

emphatic endorsement of the English rule, and is the proper one in all such cases."

The next case in our reports raised the question of the liability of an intermediate carrier to deliver goods promptly to the next carrier. The goods had been shipped at Philadelphia on the Pennsylvania Central R. R. directed to Linton, Kentucky, under a contract which limited the Pennsylvania Co. to the terminus of its road, "and the proof indicated that the liability of the delinquent road, the Louisville & Nashville R. R., was to be governed by the same contract." Judge McFarland, who delivered the opinion of the court, refers to the two preceding cases as then recently decided, and as holding, "that where there are two connecting lines of railway, and one road receives goods for transportation, marked and consigned to a point beyond the terminus of its own road, but on the line of the connecting road, the road first receiving the goods will be held liable for their delivery at their destination, unless this liability is limited by express contract." "These cases," he adds, "somewhat change the rule followed by perhaps a majority of the American cases, and follow the English rule." *Louisville & Nashville R. R. Co. v. Campbell*, 7 Heis. 253.

Shortly afterwards, this court heard and disposed of the case of *Furstenheim v. Memphis & Ohio R. R. Co.*, 9 Heis. 238. The plaintiff bought from the Pennsylvania R. R. Co. in New York a through coupon ticket from New York to Memphis. He received metallic checks for his baggage calling for Memphis. His coupon ticket was recognized and the coupons taken up by the railroad companies along the route. The proof tended to show that the breaking into the baggage and loss of contents, for which the suit was brought, occurred on the Pennsylvania road. The suit was against the last carrier. Nicholson, C. J., in delivering the opinion of the court, undertakes to discuss the legal import and extent of the contract between the plaintiff and the Pennsylvania Co., concluding thus: "All we have before us is the simple fact that the Pennsylvania Central Co. sold plaintiff tickets which were recognized as good along the whole line, and which carried him to Memphis. Without other facts and circumstances proven, we are bound to hold that the Pennsylvania Central Co. undertook for itself to transport plaintiff and his baggage to Memphis, and that as there is no privity shown between plaintiff and the defendants, the latter cannot be held responsible for the loss shown to have occurred before the baggage reached their road." This conclusion, it will be observed, is also in accord with the English rule, in so far as it requires privity of contract to sustain an action against any of the carriers other than the one in default.

Afterwards, the direct question of the liability of the intermediate carrier of freight for his own default was raised. A lot of fruit trees was shipped in North Carolina, directed to the plaintiff

at Jackson, Tennessee, which the defendant, the Memphis and Charleston R. R. Co., received from a preceding carrier, and failed to deliver to the succeeding carrier because the latter refused to pay the accrued freights. The trial judge instructed the jury that if the defendant received the packages, directed to the plaintiff at Jackson, Tenn., without any special contract limiting their undertaking, the law imposed upon the company the obligation to deliver the goods at their destination, and they would not be excused by the facts relied on. "This," says Judge McFarland, delivering the opinion of the court, "is in accord with the cases recently decided by the court of *Western & Atlantic R. R. Co. v. McElwee & Co.* In these cases the question was fully discussed, and need not be again examined." *Railroad v. Stockard*, 11 Heis. 568.

The question again came before the court at the April term, 1877, at this place. Goods were shipped at Cincinnati, packed in boxes or cases, directed to the plaintiffs at Somerville, Tenn., and delivered to the Louisville, Cincinnati, and Lexington R. R. Co. This company gave a receipt, specifying that the goods were to be transported, and delivered to the Louisville, and Nashville R. R. Co. at Louisville, subject to certain conditions noted. One of the conditions was that the liability of the company should terminate upon the delivery of the goods to the next line of transportation. The defendant was the last carrier in the line. The boxes were delivered by the defendant to the plaintiff, who, upon opening them, discovered that some of the goods were missing. It was admitted "that the goods were lost somewhere between Cincinnati and Somerville, but where is not known." It was agreed, upon the authority of *Furstenheim's* case, that the action could not be maintained because there was no privity of contract between plaintiffs and defendant. But it was held that the reason only applied where the loss sued for occurred upon the line of the company with whom the contract was made, and that there was no intimation in *Furstenheim's* case that an action might not have been maintained against the last company for its own default. And it was expressly held that upon the delivery of the goods to the defendant, it became liable for them as a common carrier, subject at most only to the limitations stipulated for on its behalf by the first company. The judgment against the defendant was sustained upon the ground that the defendant admitted the receipt of the goods without objection, and that it was impossible for the plaintiffs to show where the loss occurred. "Upon grounds of public policy," says McFarland, J., in delivering the opinion, "it is better to put upon the carrier the duty of tracing up the loss, and fixing it upon the party first liable, than to put the duty on the owner." *M. & O. R. Co. v. Holloway*, 9 Baxt. 188.

All of the foregoing cases recognize the English rule upon the receipt of freight by a carrier directed to a point beyond its term-

inus, without any limitation upon its liability, but modify it, in accordance with the great weight of American authority, so as to sustain an action against any carrier on the line for its own default. And by the last case it is determined that any carrier in the line is in default, and may be sued for a loss, where the carrier has received the packages or boxes containing the goods without objection. The case of *Carter v. Peck*, the only one which relates to the personal rights of a passenger, and *Furstenheim's case*, the only one relating to the baggage of a passenger, both follow the English rule. A through ticket, without more, would *prima facie* render the first carrier liable upon the contract for the default of the other carriers in the line of transportation in the case of passengers and their baggage, as in the case of the shipment of goods. A through contract as to the passenger will be a through contract as to his baggage, in the absence of a different arrangement. But, as in the case of goods, although the first carrier may contract and be responsible for the entire transportation, any subsequent and auxiliary carrier to whose fault it can be traced will be liable to the owner for the loss of his baggage. *Hutch. on Car.*, sec. 715. The courts of several of the States concur in holding the first company liable for the loss of baggage in the case of a through ticket. *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; *Candee v. Penn. R. Co.*, 21 Wis. 582; *Wilson v. Railroad*, 21 Grat. 654; *Burnell v. N. Y. Central R. Co.*, 45 N. Y. 184. But the check for the baggage may be given by one company for part of the line when the passenger has a through ticket from another company, in which case the former will be liable for the loss. *McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 181; *Straiton v. N. Y. & N. H. R. Co.*, 2 E. D. Smith, 184. So, no doubt, the check may, as in the case before us, be issued with the ticket but for only part of the way. In such a case, the check may be considered as standing in the place of a bill of lading for the distance called for, and imposes the duty to carry and deliver accordingly. *Dill v. S. C. Ry. Co.*, 7 Rich. 158; *Wilson v. Chesapeake R. Co.*, 21 Grat. 654.

It is conceded by the learned counsel of the plaintiff in error in the case before us that, by our decisions as given above, the whole liability in regard to passengers, baggage, and freight, is thrown upon the company issuing the ticket or bill of lading, except where an express stipulation to the contrary is shown. But he insists that the rule was changed by *Holloway's case*, 9 Baxt. 188, and *Sprayberry's case*, 9 Heis. 852; s. c., 8 Baxt. 341. But *Holloway's case*, as we have seen, only extends the modification of the English rule, by which the American courts allow an action against the actual defaulting carrier in addition to the first carrier, so as to give the action against any of the carrying companies shown to have received the goods without objection, where it is impossible for the plaintiff to show in what part of the route the loss occurred. And

in *Sprayberry's* case, the court, while, exonerating the first carrier from liability for the loss of life of a passenger by the negligence of another carrier on the line under the circumstances, decided nothing in regard to the liability for the loss of the baggage, remarking that there were authorities holding that a different rule applied to passengers from the rule applicable to freight and baggage. *Nashville & Chat. R. Co. v. Sprayberry*, 9 Heis. 857. In that case, *Sprayberry* purchased from an agent of the Nashville and Chattanooga R. R. Co. at Chattanooga, tickets for himself, wife, and two children, from that place to Shreveport, Louisiana. The tickets were coupon tickets, and indicated the route to be by the Nashville and Chattanooga road to Nashville, and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. While en route on the Mississippi River, and in the State of Mississippi, an accident occurred by which the wife and children were drowned. It appeared in proof that the different lines of road were separate and distinct, owned and controlled by different agents and officers, and that there was no contract or privity between them in regard to carrying passengers except the arrangement to sell through tickets. Under these circumstances, the court held that the first company was not liable to the husband for the damages given to him by a statute of the State of Mississippi for the loss of his wife and children through the fault of the steamboat company. "We are of opinion," says the court, "that in such cases the company selling the ticket shall be regarded as the agent of the other lines, when the tickets themselves import this, and nothing else appears."

The form of the tickets is not given, but the language of the opinion fairly implies that they showed upon their face the agency of the issuing company, which might be either in words or by each coupon purporting to be the ticket of the company over whose connecting line it was to be used. Such was the form of the ticket in *Milnor v. New Haven R. Co.*, 53 N. Y. 363. The plaintiff bought from the defendant a ticket of two coupons to Sheffield, and received a through check for his trunk. Each coupon purported to be the ticket of one of the two companies over whose roads the passenger was to travel, containing the name of the company, and being signed by different officers. In such a case, each coupon may well be treated as the separate ticket of a company issued by the selling company as agent. In the case before us, the ticket, it will be remembered, is in form the ticket of the defendant, the coupons only designating the company over whose road the particular coupon was to be used, and the termini of the route. If, as suggested by the learned counsel of the plaintiff in error, the presumption of law for or against the first company arises from the form of the ticket, we cannot say that the form adopted, although with coupons, shows it to be anything more than the ticket of the issuing com-

pany. It is substantially like the ticket, with three coupons for three several companies, in *Hart v. Rensselaer & Saratoga R. Co.*, 8 N. Y. 37, where the baggage of the passenger was checked through, and the defendant held liable for its loss as the company issuing the ticket and receiving the baggage, although owning the last road on the route.

The weight of American authority undoubtedly is that one carrier may sell to a passenger its own ticket, and at the same time the ticket of connecting lines, entitling the passenger to through transportation over all the lines, and may receive the fare for the whole distance, without becoming responsible for the carriage of the passenger beyond its line. The tickets for the several lines are in such cases known as coupon tickets, each ticket, apparently without reference to the form, being considered as the separate contract of the carrier over whose route it entitles the holder to be carried. The presumption is that the carrier who sells the tickets, nothing else appearing, sells them as the agent of the other lines, and the coupons are regarded and treated as the contracts of the respective carriers, precisely as if they had been sold by the carriers themselves instead of by the common agent. *Hutch. on Car.*, sec. 152, and note. Even in this view, it would not follow that the liability of the carriers for the passenger's baggage would be the same, or governed by the same rule as the liability for the passenger. The reason is obvious. There can never be any doubt as to the carrier by whose fault the passenger is injured, or the personal contract with him violated. While, on the other hand, there may be the same difficulty in ascertaining the carrier at fault in regard to baggage as in the case of ordinary freight. We are of opinion, therefore, that the carrier contracting to carry the baggage of a passenger by checking it to a given point becomes liable by the contract for its safe carriage, in the same way and to the same extent as the carrier of goods. The check is in legal effect a bill of lading for the baggage.

In this view, upon the finding of the trial judge that the loss occurred before reaching Omaha, the defendant became liable to the plaintiff for the value of the property taken from the trunks of the plaintiff. It is equally clear that the Union and Central Pacific R. R. Co.'s, whose roads lay beyond Omaha, were not liable to the plaintiff for the loss nor in any way in default. Not being co-wrongdoers with the defendant, no payment made by them to the plaintiff, and no release, in consideration of such payment, made by the plaintiff to them, could operate as a release of the liability of the defendant. And the transaction can only be treated as the compromise of a possible litigation, or as a mere gratuity. It would meet the abstract equity of the case to give the defendant the benefit of a credit for the value of the deduction on the return tickets over the roads of those companies, but no principle

has been suggested by counsel, or occurred to us, upon which the allowance can be made.

There is no error in the judgment, and it must be affirmed.

Carrier Liable for Goods Carried Beyond His Own Line.—It is held in some cases that where a carrier receives goods for transportation to a point beyond his own line, he is, in the absence of special contract, responsible for any loss or injury occurring to the point of destination. *Illinois, etc., R. Co. v. Copeland*, 24 Ill. 332; *Illinois, etc., R. R. Co. v. Cowles*, 32 Ill. 316; *Illinois, etc., R. R. Co. v. Johnson*, 34 Ill. 289; *Illinois, etc., R. Co. v. Frankenburg*, 54 Ill. 88; *Chicago, etc., R. R. Co. v. People*, 56 Ill. 365; *Chicago, etc., R. R. Co. v. Montfort*, 60 Ill. 175; *U. S. Express Co. v. Haines*, 67 Ill. 187; *Field v. Chicago, etc., R. Co.*, 71 Ill. 458; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Milwaukee, etc., R. R. Co. v. Smith*, 84 Ill. 239; *Western, etc., R. R. Co. v. McElwell*, 6 Heisk. 208; *East Tenn., etc., R. Co. v. Rogers*, 6 Heisk. 143; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. 253; *Carter v. Hough*, 4 Sneed, 203; *East Tenn., etc., R. Co. v. Nelson*, 1 Coldw. 272; *Kyle v. Railroad*, 10 Rich. 382; *Bradford v. Railroad Co.*, 7 Rich. 201; *Lock Co. v. Railroad Co.*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9; *Bonnett v. Fillyau*, 1 Fla. 408; *Mosher v. Southern Ex. Co.*, 38 Ga. 87; *Southern Express Co. v. Shea*, 38 Ga. 519; *Cohen v. Southern Express Co.*, 45 Ga. 158; *Angle v. Mississippi, etc., R. Co.*, 9 Iowa, 487; *Mulligan v. Illinois, etc., R. Co.*, 36 Iowa, 181; *Balt. & Ohio R. R. Co. v. Campbell*, 3 Am. & Eng. R. R. Cas. 246; *Harding v. International Nav. Co.*, 6 Am. & Eng. R. R. Cas. 588; *Cummins v. Dayton, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 36; *Texas & Pacific R. Co. v. Fort*, 9 Am. & Eng. R. R. Cas. 392; *Same v. Ferguson*, id. 395.

Carrier not Liable Beyond His Own Line.—There are many cases to the effect that where goods are received for transportation to a point beyond the carrier's line, he is not responsible for any loss occurring beyond said line in the absence of some special contract to that effect. *Nutting v. Connecticut, etc., R. R. Co.*, 1 Gray, 502; *Darling v. Boston, etc., R. R. Co.*, 11 Allen, 295; *Burroughs v. Norwich, etc., R. R. Co.*, 100 Mass. 26; *Farmers', etc., Bank v. Champlain Trans. Co.*, 16 Vt. 52; *Brintnall v. Saratoga, etc., R. R. Co.*, 32 Vt. 665; *Cutts v. Brainerd*, 42 Vt. 566; *Perkins v. Portland, etc., R. R. Co.*, 47 Me. 578; *Skinner v. Hall*, 60 Me. 477; *Inhabitants v. Hall*, 61 Me. 517; *Hood v. N. Y., etc., R. R. Co.*, 22 Conn. 502; *Elmore v. Naugatuck, R. R. Co.*, 23 Conn. 457; *Converse v. Norwich, etc., R. R. Co.*, 33 Conn. 166; *Baltimore, etc., K. R. Co. v. Schumacher*, 29 Md. 168; *McMillan v. Michigan, etc., R. R. Co.*, 16 Mich. 79; *Phillips v. North Carolina R. R. Co.*, 78 N. C. 294; *Railroad v. Pratt*, 22 Wall. 123; *Railroad v. Manufacturing Co.*, 16 Wall. 818; *Crawford v. Southern R. R. Assn.*, 521 Miss. 222; *Irish v. Milwaukee, etc., R. R. Co.*, 19 Minn. 376; *St. John v. Van Santvoord*, 25 Wend. 660; 6 Hill, 157; *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Lamb v. Camden, etc., R. R. Co.*, 46 N. Y. 271; *Reed v. U. S. Ex. Co.*, 48 N. Y. 462; *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491; *Condict v. Grand Trunk R. R. Co.*, 59 N. Y. 500; *Camden, etc., R. R. Co. v. Forsyth*, 61 Pa. St. 81; *St. Louis Ins. Co. v. St. L. etc., R. Co.*, 3 Am. & Eng. R. R. Cas. 260; *St. Louis, etc., R. Co. v. Larned*, 6 Am. & Eng. R. R. Cas. 436; *Hadd v. U. S. & C. Ex. Co.*, 6 Am. & Eng. R. R. Cas. 448; *Detroit, etc., R. Co. v. McKenzie*, 9 Am. & Eng. R. R. Cas. 15; *Michigan Central R. Co. v. Myrick*, 9 Am. & Eng. R. R. Cas. 25; *Lindley v. Richmond, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 81; *Cummins v. Dayton, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 36; *Knight v. Providence, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 90.

BERG et al.

v.

ATCHISON, TOPEKA AND SANTA FE R. R. Co.

(*Advance Case, Kansas. 1888.*)

Where a railroad company receives goods for transportation to a point beyond its line upon a special contract, in which is no express agreement to transport to such point, but the place is only named as the point of destination, and in which it is expressly agreed that the goods are to be transported over the company's road and delivered in good order to the connecting carrier, and that the company is not to be responsible as carrier beyond its line and its liability as such is to terminate upon delivery of the goods to the connecting carrier: *Held*, (1) that there is no uncertainty or ambiguity in the contract, and that it is clearly only a contract for transportation over its own line and delivery to a connecting carrier; (2) that such contract, being no contract for through transportation to the point of destination, presents no question of an attempt to limit the common-law liability of the carrier as to anything happening beyond its own line; and (3) that the company transporting over its own line and delivering the goods in safety to the connecting carrier performs its contract and is not liable for any subsequent loss or damage.

Frank G. White for plaintiff in error.

George R. Peck and Frank Doster for defendant in error.

BREWER, J.—Plaintiffs in error, plaintiffs below, were grain merchants at McPherson, Kansas, and shipped over the road of defendant several carloads of wheat to parties at Chicago, Ill. Claiming that when the wheat reached Chicago, there were certain shortages and loss of wheat, they brought their action against the defendant to recover damages therefor. The defendant answered setting up certain written contracts, alleging that the wheat was shipped under those contracts and claiming that under them it contracted simply to transport the wheat safely over its own road, and deliver it in good order to connecting lines, and that it did so transport and deliver the wheat. To this answer the plaintiffs demurred. The demurrer was overruled and plaintiffs allege error. It will be perceived that the case comes before us upon a question of pleading and not upon any question of evidence. We are not to inquire whether in fact the shipments were made under these contracts, or whether the defendant safely transported the wheat over its own road, and delivered the full amount in good order to the connecting road. Neither do we need to inquire what evidence is necessary to prove a shipment under the contracts, or a safe transportation and delivery by the defendant. It may also be conceded that a common carrier may contract for the transportation of freight beyond the line of its own road, and that

upon such a contract it assumes all the obligations of a carrier for the entire distance. And further it may be conceded that when the contract of shipment is prepared by the carrier and is doubtful or ambiguous in its terms, the doubt or ambiguity is to be resolved in favor of the shipper and against the carrier. This is upon the general rules respecting the interpretation of contracts. Whether the rules of the English courts that carriers who receive goods and book them for a certain destination are without any further or special contract responsible throughout the entire route, is a question which, while for the purposes of this case, it may be answered in the affirmative, we do not now attempt definitely to decide. It is a question upon which the courts in this country are divided. 2 Redfield on Law of Railways, sec. 14 and cases cited; *Skinner v. Hall*, 60 Me. 477; *Babcock v. Railroad Co.*, 49 N. Y. 491; *Railroad Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *Bryon v. Railroad Co.*, 11 Bush, 597; *Berg v. Steamship Co.*, 5 Daly, 394; *Crawford v. Railroad Asso.*, 51 Miss. 222; *Lock Co. v. Railroad* 48 N. H. 339; *Railroad Co. v. McKenzie*, 43 Mich. 609; *Hadd v. Express Co.*, 52 Vt. 345.

Passing by these matters, we remark that the bill of lading is neither ambiguous nor uncertain. It is clear and definite and not fairly open to two constructions. Near the head of the bill of lading in large letters and so as to call the attention of the shipper to the scope of the contract are these words: "For freight going beyond this line of road only." Then on the left hand column, under the title consignee and destination, are the words. "Notify R. and B. Chicago, Ill., via H. and St. Jo. R. R." This statement of the consignee and destination is all that by any pretence can be claimed to indicate a contract to transport to Chicago. While parallel with this and on the right hand column in ordinary sized type, is an acknowledgment of a receipt of the goods, describing them, followed by these words: "To be transported over the road and delivered in like good order to the next company or carriers, for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as a common carrier for such property beyond its line of road, or while at any of its stations awaiting delivery to such consignee or carriers—the company being liable as warehousemen only—" And further down in smaller type is this stipulation: "The responsibility of this company as a common carrier to terminate on delivery of the freight as per this bill of lading to the company whose line may be considered a part of the route to the place of destination of said property." Now, nothing could be clearer than that the company stipulated only for safe transportation over its own road, and delivery in good order to the connecting carrier. It will be borne in mind that there is no express agreement to transport to Chicago. The only thing which con-

nects Chicago with the transportation is where it is named as the point of destination, while the express agreement and the only agreement expressed is that the company shall not be responsible as a common carrier beyond its own line, and it agrees simply to transport the goods over its own line, and deliver it to the connecting carrier. It is difficult to see how language could be used to make the contract more express and clear. In the case of the *Railroad Co. v. Bank*, 20 Wis. 130, the contract was no more express or clear than in the case at bar, and it was held that the company had expressly restricted the liability as carrier to the line of its road. See also the case of *Railroad Co. v. Pontius*, 19 Ohio St. 221, where the bill of lading was very like that before us, and it was held that the company's liability was restricted to its own line. *Condict v. Railroad Co.*, 54 N. Y. 500. We remark again that this is not a case in which a common carrier is attempting to limit his common law liability by contract. It is the duty of a common carrier to receive and transport goods over its own line, a duty which it must perform or respond in damages. But it is not its duty to transport such goods over the line of any other carrier or to contract for such transportation; and it cannot be compelled to assume such an obligation. Its entire common law duty is limited to its own line; it owes nothing to the public beyond that. While it may be bound if it contracts for transportation beyond its line, yet it is not bound, unless by contract, express or implied, it does undertake such transportation. Until it assumes to contract for such transportation no question can arise as to whether it is attempting to restrict its common law liability. See in addition to authorities heretofore cited, *Railroad Co. v. Mfg. Co.*, 16 Wall. 318. The argument of counsel therefore as to how far a carrier may by contract restrict its common law liability is not in point. There is nothing else requiring notice. The contract being clear and unambiguous, and only for transportation over defendant's road and safe delivery to the connecting carrier, and that contract having been as conceded by the pleadings fully performed, for any subsequent loss the connecting carrier is alone responsible. The judgment will be affirmed.

Limitation of Liability to Carrier's own Route.—It is well settled, even in those States where the acceptance of goods by a carrier marked to a destination beyond his own line is held to render him responsible for their safe through transportation, that it is competent for him by special contract to limit his liability to his own line. In such case his full duty is discharged when he delivers the goods in safety to the connecting carrier. *Aldridge v. Great Western R. Co.*, 15 C. B. (N. S.) 582; *Fowler v. Great Western R. Co.*, 7 Exch. 699; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1; *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Railroad Co. v. Pratt*, id. 123; *St John v. Express Co.*, 1 Woods, 615; *Sullivan v. Thompson*, 99 Mass. 259; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Pemberton Co. v. New York, etc., R. Co.*, 104 Mass. 144; *Burroughs v. Norwich R. Co.*, 100 Mass. 26; *Gibson v.*

American Express Co., 1 Hun. 387; Ricketts v. Baltimore, etc., R. Co., 61 Barb. 18; Witlock v. Holland, 55 Barb. 443; Hinkley v. New York Central R. Co., 3 T. & C. 281; Babcock v. Lake Shore, etc., R. Co., 49 N. Y. 491; Aetna Ins. Co. v. Wheeler, 49 N. Y. 616; Reed v. United States Express Co., 48 N. Y. 462; Lamb v. Camden & Amboy R. Co., 46 N. Y. 271; American Express Co. v. Second National Bank, 69 Pa. St. 394; Penna. R. R. Co. v. Schwarzenberger, 45 Pa. St. 208; Mulligan v. Illinois R. Co., 36 Iowa, 180; Illinois Central R. Co. v. Frankenberg, 54 Ill. 88; Chicago, etc., R. Co., v. Montfort, 60 Ill. 175; United States Express Co. v. Haines, 67 Ill. 137; Erie R. Co. v. Willcox, 84 Ill. 239; Taylor v. Little Rock, etc., R. Co., 33 Ark. 393; Farmers', etc., Bank v. Champlain Trans. Co., 28 Vt. 186; Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81; Maghee v. Camden & Amboy R. Co., 45 N. Y. 514; United States Express Co. v. Rush, 24 Ind. 403; Oakly v. Gordon, 7 La. Ann. 235; Martin v. American Express Co., 19 Wisc. 336; Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221; St. Louis, etc., R. Co. v. Piper, 18 Kans. 505; East Tennessee, etc., R. Co. v. Brumley, 6 Am. & Eng. R. R. Cas. 356. But see Galveston H. & H. R. Co. v. Allison, 12 Am. & Eng. R. R. Cas. 28.

DEMING

v.

NORFOLK AND WESTERN R. R. Co.

(Advance Case, U. S. Circuit Court, E. D. Penna. May 16, 1884.)

An agreement between connecting carriers on a through route, each having exclusive control and ownership of its line, with arrangements for continuous transportation on through bills of lading at settled rates of compensation, each being by special provision in the bills of lading responsible only for his own acts or omissions, does not make such carriers partners and responsible for the acts or omissions of each other.

A railroad company, being one of a connecting line of carriers as above, received certain cotton from a preceding carrier on the line, for transmission. The bill of lading contained a clause exempting the company from liability for loss by fire occurring either while the cotton was in actual transit or in store awaiting transit. The company speedily and safely transported the cotton, and tendered it at the wharf of the steamship company next in the line of carriers. The company had no knowledge that the steamship company could not at once transport the cotton, but placed it at the latter's request on the latter's wharf and in its warehouse, places equally convenient for shipping as the place where delivery had been originally tendered. While so stored the cotton caught fire and was destroyed. *Held*, that the railroad company was not liable for the loss.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

R. C. McMurtrie & Morton P. Henry for plaintiff.

R. C. Dale, Samuel Dickson and Wm. Allen Butler for defendant.

BUTLER, J.—The court find the following facts :

I. The Norfolk and Western R. R. Co., the defendant, is a corporation owning and operating a line of railroad extending from Bristol, Tennessee, to Norfolk, Virginia. At Bristol it connects with the line of the East Tennessee, Virginia & Georgia R. R. Co., and at Roanoke, about one hundred and thirty miles east of Bristol, with that of the Shenandoah Valley R. R. Co., which connects at Hagerstown with the Pennsylvania Railroad system. These companies have entered into certain contract arrangements for the conduct of through business, under the name of the Virginia, Tennessee and Georgia Air Line, but there is no other evidence in the case showing the terms of this contract than appears in the bills of lading and manifests, and the conduct of the parties as hereinafter stated.

II. On October 11, 1883, the plaintiffs, R. H. Deming & Co., who are cotton buyers, shipped at Memphis, Tennessee, for Woonsocket, R. I., two lots, one of fifty and the other of one hundred bales, and on October 17, 1883, another lot of one hundred bales. The shipment was made upon the Memphis and Charleston Railroad, and three through bills of lading given, all similar in form, copies of which are hereto annexed, as "Exhibit A."

The material clauses of the bills of lading are as follows :

MEMPHIS AND CHARLESTON RAILROAD AND CONNECTIONS.

(East Tennessee, Virginia and Georgia R. R. Co. Lessee.)

OCTOBER, 1883.

"Received of A. B. the following packages marked, &c., to be transported by the Memphis and Charleston Railroad and connecting railway and steamship lines, to order, at Woonsocket, R. I. . . . Upon the following conditions:

1. That the Memphis and Charleston Railroad, and the steamboats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable . . . for loss or damage on any article of property whatever by fire or other casualty while in transit, or while in depots or other places of transshipment, or at depots or landings at points of shipment or delivery. . . .

7. In consideration of the special rate named in margin, the shipper or agent of the owner of the property carried agrees to effect an insurance against loss or damage by fire while in transit, in deposit, or in places of transshipment, or at depots or landings at all points of delivery; and it is expressly agreed that the carrier shall be entitled to the benefit of any insurance effected covering any such risk, loss, damage, or detriment.

8. It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property here receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of said loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

This contract is executed and accomplished, and the liability of the com-

panies as common carriers thereunder terminates on the arrival of the goods or property at the station or depot to which this bill contracts, and the companies will be responsible as warehousemen only thereafter; and unless removed by consignee from the station or depots of delivery within twenty-four hours of their said arrival, they may be removed and stored by the companies at the owners expense and risk.

NOTICE.—In accepting this bill of lading, the shipper or the agent of the property carried, expressly agrees to all stipulations, exceptions, and conditions.

In Witness Whereof, The agent hath affirmed to _____ bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Agent.

III. The route over which the cotton was to be carried, as fully understood by the plaintiffs, was by the Memphis & Charleston road to Chattanooga, thence by the East Tennessee, Virginia & Georgia Railroad to Bristol, thence by the Norfolk & Western Railroad to Norfolk, thence by the steamers of the Merchants' and Miners' Steamship Co. to Providence. Manifests or way-bills, which are memoranda sent by the first carrier with each car containing instructions to the succeeding carriers for the transshipment and final delivery of the freight, accompanied each shipment, giving the directions under which the cotton was to be transported and transferred from one carrier to the other. The through freight was seventy-four and seventy-eight cents per hundred pounds, which was less than one half the sum which would have been charged had the cotton been shipped and re-shipped over each of the connecting lines. The plaintiffs had made other shipments by the same route, and knew the line of steamers by which the cotton was to be carried from Norfolk to Providence.

The time occupied in transport between Bristol and Norfolk by railroad is forty-eight hours, and from Roanoke to Norfolk is thirty-six hours. The usual delay in transshipment at Norfolk was two days. In ordinary course of transportation, cotton reaches Providence in fourteen to eighteen days from Memphis, and it was the usual course of dealing of the plaintiffs to send out tracers if the cotton did not arrive within twenty days from the time of shipment.

IV. The Merchants' and Miners' Transportation Co. run two lines from Norfolk, one to Boston, and one to Providence, and prorate with the Virginia, Tennessee & Georgia Air Line upon all freight received from over that line; and, by an understanding between the steamship companies running steamers from Norfolk, is the only line that carries freight to points east of the Connecticut River. Under the same understanding, the Old Dominion Steamship Co. running to New York was to receive all freight to points west of the Connecticut River, and the Baltimore Steam Packet Co. for Philadelphia, in connection with the Philadelphia, Wilmington & Baltimore Railroad. Upon the Providence line

there were four steamers making tri-weekly trips, which were of sufficient capacity to carry the freight that usually offered.

V. Upon the fifteenth of October, the transportation company was unable to accept five hundred bales of cotton till the next day, on account of accumulations of freight which had grown gradually from early in the month. Between the 15th and 23d of October there had been communication between the officers of the two companies, in reference to the forwarding of the increased quantities of freight that were in transit. The Norfolk agent of the steamship company visited Baltimore, Philadelphia, and New York to charter other steamers, and chartered the only steamer which he had succeeded in finding. This steamer arrived at Norfolk on October 28th. The president of the steamship company also promised to transfer in a few days one of its Savannah steamers to the Providence line to accommodate the unusual influx of business; and in order to increase the number of trips between Norfolk and Providence, temporarily stopped running up to Baltimore, which was on the route. In the fall of the year all lines of transportation from the south to the north are commonly more or less crowded, but the pressure in October and November, 1883, was unusually great upon all lines. When the first shipment arrived on the 23d of October, an extra steamer was expected in a few days. About twelve thousand bales of cotton had accumulated on the wharves and warehouses of the steamship company, and when the first shipment of the cotton in question arrived upon the 23d of October, and the agent of the railroad company tendered delivery in due course, no more could be conveniently stored at that point, and the agent of the steamship company declined to accept it, upon the ground that he had no place to store it, but proposed that if the railroad company would unload and store in its own warehouse and on its wharf about two thousand bales of cotton, he would pay for insurance upon it and send a steamer in a few days to remove it. The wharf is the regular terminus of the railroad of the defendant in the city of Norfolk, and equally accessible as that of the steamship company to steamers. In view of the declared and actually existing impossibility of its receipt by the transportation company, and in reliance upon the assurance from the officers of the steamship company that an additional steamer would be forwarded to remove the cotton within a few days, the superintendent of the railroad company authorized the Norfolk agent to unload the cotton and effect an insurance of \$100,000 in the name of "The Norfolk & Western R. R. Co., and for account of whom it may concern." On October 26th, about one thousand bales additional arrived, making three thousand and twenty-eight bales in all, and were unloaded under the same agreement, and \$40,000 additional insurance was effected. The premiums were paid by the steamship company.

The exact dates of the arrival of the cotton were as follows

1883, October 22d	61 bales.
23d	826 "
24th	352 "
25th	842 "
26th	714 "
27th	103 "
31st	107 "
Date of arrival not given	23 "
<hr/>	
3028 bales.	

The cotton thus stored on the defendants' wharf and in the warehouse was cotton destined for Providence and was selected by the steamship company for unloading at the wharf for this reason.

No increased risk of fire arose from placing the cotton on the wharf and in the storehouse, as was done.

It was the custom of each company to insure merchandise in its custody, and like insurance would have been taken out if the cotton had been stored at the steamship wharf. From day to day repeated assurances were given that a steamer would be sent, and the extra vessel which arrived on October 28th had been promised for the removal of this cotton, but was loaded at the other wharf, because of some difficulty in reference to coaling or loading; and the "Berkshire," a vessel capable of carrying about five thousand bales of cotton, was transferred from the Savannah line to Norfolk, and she was expected to reach there on the 13th of November, but did not do so until the night of the 14th of November, having been delayed at Boston or on her way. On the morning of 14th November a fire occurred which destroyed the larger part of the cotton. None of the three thousand and twenty-eight bales could be identified, and the loose cotton saved was sold under the direction of the fire underwriters, and the proceeds deposited in bank for the benefit of whom it might concern.

The value of the plaintiffs' cotton which was burned was \$9121.87. No notice was given to the plaintiffs of the storage and detention of the cotton, and it does not appear from the evidence that tracers were sent out, or inquiry made by the plaintiffs. Notice of the loss of their cotton was given to the plaintiffs in Providence by letter dated Norfolk, November 27th, which was the first knowledge the plaintiffs had of their loss.

No notice was given to the plaintiffs of the sale of the remnants of the cotton saved from the fire. The cotton burned had been sold by the plaintiffs to the mills for consumption.

In addition to the three thousand and twenty-eight bales already mentioned, another lot of cotton amounting to one thousand bales, insured in the name of the steamship company, was stored in the

same warehouse, and was also burned, making about four thousand bales in all.

VI. After October 26th, and up to the time of the fire, freight continued to be received at Bristol, and other cotton at the rate of eight hundred bales a day arrived by the Norfolk & Western R. R. and was delivered to the steamship company, and large shipments were made from the steamship wharf to Boston and Providence, but it does not clearly appear that any cotton reaching Norfolk after October 26th had been shipped before November 14th. This fact is left in doubt by the testimony; but it is shown that no considerable quantity went forward, and no intentional preference was given. If the steamer which arrived on October 28th had been sent as promised by the steamship company to the railroad wharf, the plaintiffs' cotton would have been forwarded on that or the following day.

VII. Cotton could be forwarded by sail from Norfolk to Providence, but no cotton had been shipped coastwise by sail from that port for the last ten years. Schooners that had been employed in other trades were seeking freights in Philadelphia and New York.

A steamship, the *Juniata*, with a capacity of two thousand five hundred bales could have been chartered at Philadelphia on and after November 7th. This fact was not known to the defendant or to the agent of the steamship company, nor was the vessel advertised for charter or put in the hands of brokers. The *Juniata* had previously been moving cotton between Savannah and New York.

No attempt was made to forward by the Shenandoah Valley R. R. via Roanoke. Cotton is sent to New England points from the southwest by this line, but a block existed there, which lasted from July until nearly Christmas; and the arrangements for transferring cars, necessitated by a change of gauge at that point, were not completed until February, 1884. The bulk of cotton, however, goes forward via Norfolk, that being a cheaper and more convenient route.

No attempt was made to forward by the Canton line to Baltimore and thence to destination by rail, it being known to the agent of the steamship company that its line was also running full, and upon application it did decline to charter one of its steamers.

The Merchants' & Miners' Co. offered the cotton for transportation to the Old Dominion Steamship Co. That line was also crowded, and the cotton was refused. In other respects the Merchants' & Miners' Co. confined its efforts to chartering additional steamers, as already stated. It does not appear that the railroad company itself made any efforts to secure other transportation to Providence after the refusal of the Merchants' & Miners' Co. to accept, but relied upon the assurances of the officers and agents of the steamship company that vessels would be supplied in a few days.

VIII. The plaintiffs held an open policy of insurance in the Phoenix Insurance Co. of Brooklyn, covering the entire transit from Memphis to Woonsocket, as follows :

"By the Phoenix Insurance Co., R. H. Deming & Co., on account of themselves and to cover all cotton consigned to them by invoice and bill of lading, in case of loss to be paid in funds current in the city of New York, to them or order, do make insurance and cause to be insured, lost or not lost, at or from any seaport or inland town in the United States direct or via port or ports to Boston, New York, Providence, and mills in the New England States. The fire shall be covered by this policy for not exceeding ten days prior to shipment, and for not exceeding ten days after arrival and discharge at port or place of destination, without additional charge of premium therefor. On cotton and other merchandise, each ten bales subject to separate average. To cover all cotton, whether consigned to them or to other parties in which the said R. H. Deming & Co. have an interest. To attach to all shipments whether endorsed or not, but notice to be given this company as soon as known to the assured. This policy to attach as soon as the property is at the risk of the owner. Either party at liberty to cancel on giving ten days' written notice, but not to prejudice any risk then pending. Sum insured, \$500,000, upon all kinds of lawful goods and merchandise, laden or to be laden on board the good vessel or vessels or conveyances. To attach to all shipments made on and after this date. Insured for cost and ten per cent, unless otherwise agreed upon at time of endorsement. Also to cover such other shipments as may be approved and endorsed by this company. Premiums to be settled monthly."

Such were the facts.

What were the defendant's obligations? Did it discharge them?

The answer to the first question involves the relations of the parties, as shipper and carrier. Did these relations spring from the express contract entered into on receipt of the merchandise at Memphis, or from an implied contract, arising from its receipt, in transit, at Bristol.

The defendant was not a party to the bill of lading, nor responsible for anything done or omitted, when the merchandise was received at Memphis. The agreement between the several railroad companies did not make them partners, nor responsible in any respect for each other's acts or contracts. They were connecting carriers on a through route, each having the exclusive ownership and control of its line, with arrangements for continuous transportation on through bills of lading, at settled rates of compensation, each being alone responsible for its own acts or omissions, as specified in the bill before us. That such agreements do not render intermediate carriers responsible for the undertakings,

representations, or misconduct of the carrier who receives merchandise from a shipper seems to be so fully settled by the authorities as to leave nothing for discussion. It was the point directly involved and decided in *Insurance Co. v. Railroad Co.*, 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260.

The defendant's obligations were, therefore, those of an intermediate carrier, arising out of the implied contract, springing from receipt of the goods. These bound it for safe carriage over its own line, and for delivery or tender to the next carrier beyond, within reasonable time. *The Insurance Co. v. Railroad*, 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260; *Empire Co. v. Wallace*, 68 Pa. St. 302; *Myrich v. Railroad Co.*, 107 v. 102 U. S. s. c., 9 Am. & Eng. R. R. Cas. 25; *Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318. It was entitled to the benefit of all exemptions allowed by the shipper, and bound to the terms of the bill of lading generally, as respects freight, etc. Being prepared to carry the merchandise, on its arrival at Bristol, it was the defendant's right, as well as duty, to accept it, without inquiry. Had it not been so prepared, the acceptance would have rendered it responsible as carrier while the merchandise remained in its possession, no matter how great the delay arising from this cause might have been. The defendant was not, however, responsible for the succeeding carrier's failure to accept or provide means for further transportation. If the *Memphis and Charleston R. R. Co.*, when it received the merchandise, was aware of the deficient means of transportation from Norfolk (and that delay must consequently arise), and failed to communicate this fact to the shipper, we may assume that this company was in fault. To visit the defendant, however, with responsibility for such fault, it must appear that the latter is responsible for the former company's acts—and we have found it was not. If knowledge of this fault would entail responsibility on the defendant, through acceptance of the merchandise, such knowledge could not be inferred from anything shown. The defendant, as before stated, was bound to no inquiry, and had (so far as appears) no information on this subject. It is unimportant that the defendant knew of the embarrassments at Norfolk, when it received the merchandise at Bristol. Being then in transit the defendant's duty bound it to such reception. No probable benefit could arise to the shipper from refusing. In view of existing circumstances a refusal might have entailed serious responsibilities.

The cases relied upon by the plaintiff,—the *Railroad Co. v. the Manufacturing Co.*, 16 Wallace, 318, and *Busby v. Railroad Co.*, 13 Fed. Rep. 330,—are inapplicable. The obligations involved were those of carriers receiving merchandise from the shipper, and either undertaking to provide means of carriage throughout,—as in the latter case,—or failing to communicate knowledge

(which they had) of obstacles in the way of transportation,—as in the former. The responsibility arose in the one case, out of the express undertaking, and in the other, out of the bad faith practised.

Such being the defendant's obligations, did it discharge them?

It carried the merchandise safely and expeditiously to Norfolk. When the first consignment arrived on the 23d of October, it was tendered to the Merchants' and Miners' Steamship Co., and was refused on account of accumulation of freight on its wharves; with the request or proposal, however, to place it and subsequent consignments on the wharf and in the warehouse of the defendant, (a place as convenient for loading into the steamboat company's vessels as on its own wharves), and with assurance that vessels would speedily be provided and sent there for it. This request was complied with, under a reasonable expectation that the steamship company would load and forward the cotton without unreasonable delay. Placing the subsequent consignment as proposed, was a substantial tender. The designation of this place for loading, was a virtual designation of the place for tender. To hold that the defendant should have hauled the cotton, which arrived on the 26th, to the steamship company's wharves, in view of what had occurred, would be unreasonable and unjust. The fact that insurance was procured is unimportant. Should the defendant have done more? In view of the facts it was not required to forward by any other route; nor would it have been justified in doing so. The steamship company was the carrier contemplated by the plaintiff. Indeed, it must be regarded as having been designated by him. If not on shipment at Memphis, it certainly was on delivery to the defendant. Those so delivering represented the plaintiff. That a preceding carrier represents the shipper in forwarding by his successor on a through line (under ordinary circumstances) is settled. The plaintiff's insurance would have been jeopardized by the substitution of any other route. Besides this, as already stated, the defendant was fully justified in believing that the merchandise would be accepted and carried within a reasonable time by the steamship company, and would reach its destination more expeditiously by this route than any other. But for unforeseen circumstances, which could not be anticipated, this expectation would have been realized. Furthermore, it can hardly be said there was any other practically available route. The defendant was not, therefore, in fault.

It must not be overlooked that the question here is not (as in *Railroad Co. v. Manufacturing Co.*, 16 Wallace, 318) whether the defendant remained liable under his obligations as carrier, to the date of loss, but whether he was guilty of wilful fault, and consequently forfeited the exemptions in the bill of lading, and thus became responsible for the consequences of the fire. That he

was not guilty of such fault seems reasonably clear. Judgment must therefore be entered for the defendant.

Extra Terminal Liability.—As to the liability of a carrier for the safe transportation of goods beyond its own line see *Piedmont Mfg. Co. v. Columbia & Greenville R. R. Co.* and note, *supra*, and *Louisville & Nashville R. Co. v. Weaver* and note, *supra*.

As to the limitation by special contract of a carrier's liability to his own line see *Berg et al. v. Atchison, T. & S. F. R. Co.* and note, *supra*.

Contracts Limiting Liability Enure to Benefit of Intermediate Carrier.—Where goods are to be transported over a number of connecting lines, a contract entered into by the carrier receiving the goods stipulating for exemption from liability in general terms will enure to the benefit of all the various carriers over whose roads the goods may be carried. *U. S. Express Co. v. Harris*, 51 Md. 127; *Levy v. Southern Express Co.*, 4 S. C. 234; *Maghee v. Camden, etc., R. R. Co.*, 45 N. Y. 514; *Manhattan Oil Co. v. Camden, etc., R. R. Co.*, 54 N. Y. 197; *Lamb v. Camden, etc., R. R. Co.*, 2 Daly, 454; s. c., 46 N. Y. 271; *Hall v. N. E. R. R. Co.*, L. R. 10 Q. B. 487; *Whitworth v. Erie R. Co.*, 6 Am. & Eng. R. R. Cas. 349; *Halliday v. St. Louis, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 443; *Whitehead v. Wilmington, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 168.

Unless, indeed, the contract expressly stipulates that the immunity shall extend only to the single company entering into it. *Bancroft v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 262; *Babcock v. Lake Shore, etc., R. R. Co.*, 49 N. Y. 491; *Martin v. Am. Express Co.*, 19 Wisc. 336; *Camden, etc., R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Merchants' Dispatch Trans. Co. v. Bolles*, 80 Ill. 473; *Railroad Co. v. Pratt*, 22 Wall. 123; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

Partnership.—An agreement between carriers for a through freight line does not constitute them partners so as to make one liable for the acts of the other. *Watkins v. Terre Haute, etc., R. Co.*, 1 Am. & Eng. R. R. Cas. 614; *Hill v. Burlington, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 21; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; s. c., 3 Am. & Eng. R. R. Cas. 260.

LOUISVILLE AND NASHVILLE R. R. Co.

v.

MASON.

(11 *Lea's Tennessee Reports*, 116.)

In an action against a railroad company, as a common carrier, for damages to horses in transit, the measure of damages would be the value of the horses killed and the depreciation in the value of those injured, at the place of delivery, but direct testimony by the opinion of witnesses of that value or depreciation is not indispensable; it is sufficient if there is proof of these facts in the market of a neighboring State connected with the place by railroad, and a full description of the animals and their qualities, and of the character of the injuries.

Under such circumstances, it is not error to charge the jury that they may fix the amount of the plaintiff's damages, if they find for him, from the age and qualities of the stock, and the nature of the injuries as shown by the proof, although no witness has given an opinion as to the value of the stock or the amount of damages at the place of delivery.

APPEAL in error from the Law Court at Humboldt.
McFarland & Bobbitt for Railroad.
Ware & Martin for Mason.

COOPER, J.—Action by Mason against the railroad company for damages in the killing of one horse and injuring two other horses by the negligence of the servants of the defendant as a common carrier, in transporting the horses from Louisville, Kentucky, to Milan, Tennessee. The jury found a verdict in favor of the plaintiff for \$175, and the defendant appealed in error.

The plaintiff gave his own deposition, and took the deposition of one Ramsey in support of the action. These depositions were taken in Grant county, Kentucky, and are somewhat loose and meagre. On the trial, the plaintiff rested upon his own deposition, and Ramsey's deposition was read by the defendant. No other testimony was introduced. The plaintiff in error now insists that the evidence shows that the plaintiff below and Ramsey were joint owners of the horses for whose loss and injury the suit was brought, and that the verdict is otherwise unsupported by the proof. The testimony shows that two car loads of horses were shipped by the defendant's road at Louisville, Kentucky, to Milan, on the same train, the plaintiff being in charge of one of these cars, and Ramsey of the other. Each car seems to have contained twenty horses. In the loose and inartificial way in which the depositions are taken, both witnesses use language from which it might be inferred that they were joint owners of the stock. The counsel of the plaintiff seems at first to have put that construction upon the language, for he obtained leave of the court to amend and actually amended by making Ramsey a co-plaintiff. This was afterwards corrected by dismissing Ramsey from the case. The point now made was no doubt submitted to the jury upon a charge which has not been excepted to, and they have found that Mason was sole owner of the horses in controversy. The finding is warranted by the testimony. For the plaintiff, in his deposition, treats the horses as belonging to him, and the cross-examination of the railroad company takes the fact for granted in both depositions. The equivocal words are due to the fact that the shipments of each witness were made at the same time, and included the same number of horses.

Both of the witnesses concur in testifying that the horses were injured in the transportation from Louisville to Milan. The plaintiff below deposes that one of them was so badly injured that he

refused to receive it from the company. He added, and the statement was read without objection, that he understood the horse was dead. In the absence of any evidence to the contrary, this was sufficient to warrant the jury in finding damages for the loss of one horse and for the injury to the others.

The only point of real difficulty in the case is raised by the charge of the court on the measure of damages. The plaintiff testified that the horse which was killed was a red roan, blaze-faced, one glass eye, about 15½ hands high, with no disease of any kind, sound as a dollar, going all the gaits well, and worth \$175, adding that the animal "would have brought that amount in the market." He is then asked, "What was the market value of the horse at Milan or in the market?" His answer is, "I could have sold the horse when I shipped for \$175." He further testifies that the other horses were damaged \$50. The witness Ramsey says that the horse killed was between four and five years old, and a good saddle horse. He is asked if he knew the value of the horse in the markets, and replies in the affirmative. He is also asked, "What was the market value of the horse left at Milan, and what was the amount of damage to the other horses?" His answer is, "I say \$125, and they were damaged about \$150." Both of the witnesses say, in answer to a question directed to the point, that when they speak of the market value, they mean the market in Mississippi.

Upon this testimony if his Honor, the trial judge, directed the jury, as he probably did, the record not showing the entire charge, that they must find the value of the lost horse, and the damages to the other horses, at Milan at the time when they should have been delivered by the company to the plaintiff, the verdict would have been sustained by the evidence. For the plaintiff's answer above, "I could have sold the horse when I shipped for \$175," might well be considered as giving the market value at Milan, to which his attention was directed by the question.

His Honor, however, upon the supposition that the jury might find that there was no evidence of the value of stock at Milan, added the following charge, which is excepted to: "If you find from the testimony that the stock of plaintiff in controversy was shipped to Milan, Tennessee, and that the plaintiff is entitled to recover damages for injuries done by the defendant to his stock, then the jury may assess the damages from the testimony as to the age and qualities of the horse that is claimed to have died, and from the testimony as to the nature of the injury to the other stock of plaintiff, if any of his other stock were injured, although no witness gave his opinion as to the value of the horse at Milan that died, if either died, or gave his opinion as to the amount of damages done to the other stock at Milan, if plaintiff's other stock were injured by defendant. For the jury may fix the amount of

plaintiff's damages, if they find for him, from the age and qualities of the stock, and the nature of the injuries as shown by the proof, although no witness has given an opinion as to the value of the stock or the amount of the damage at Milan."

The charge must be taken in connection with the fact that there was proof of the value of the horses in the market of the State of Mississippi. The true measure of damages was the value of the horses at the time and place where the defendant, as a common carrier, was bound to deliver the animals to the plaintiff. The horses were shipped at Louisville, but it does not appear positively to what point they were to be carried. It is fairly inferable that they were to be transported to Milan for the Mississippi market. The most satisfactory evidence of their value at Milan would have been direct testimony to that effect. But such testimony was clearly not indispensable. It has been held by this court that in a suit for the recovery of damages for the breach of a contract made in this State for the delivery of a mining corporation in this State, the value of the stock might be ascertained by its market value in the large cities of the eastern seaboard, where such stocks had a marketable value. *Henegar v. Isabella Copper Co.*, 1 Cold. 241. So of the State bonds of an adjacent sister State. *Doak v. Snaff*, 1 Cold. 180. The value in both cases to be subject to a deduction for the expense of converting them into money by sending them to the best market. The principle of these cases was extended to the case of a conversion of cotton in Hardeman county, in this State, where the only proof of the value of the cotton was evidence of its value at Louisville, Kentucky. The competency, as well as the sufficiency, of the evidence was objected to. The court held, Nicholson, C. J., delivering the opinion, that the evidence was not only competent, but sufficient to sustain the verdict. The means of communication, said his Honor, between the different parts of the country are so easy and rapid, that the market price of a commodity of trade at a commercial centre may properly be looked to in ascertaining values, subject to a deduction for the expense of converting the commodity into money. *Fort v. Saunders*, 5 Heis. 487. And this is the general rule when the value can only be ascertained by proving the market price at the nearest point where the goods or chattles of the quantity in question can be bought and sold. 2 Suth. on Dam. 373.

The case before us falls within the principles settled by the decisions just cited. The evidence of the value of the horses in the Mississippi market was clearly competent, and, in the absence of any countervailing testimony, was sufficient to sustain the verdict. *Muller v. Eno*, 14 N. Y. 597. It is not a case of the total absence of any testimony of the value of the horses and of the damages sustained, but of positive testimony of such value and damages in a market for such animals in direct communication with, and within a

few hours' travel of, Milan. The jury were properly left to exercise their own judgment and apply their own knowledge and experience to the subject. They are not required to accept, as a matter of law, the conclusions of the witnesses instead of their own. "While they cannot," to use the language of Mr. Justice Field in a recent opinion, "act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently, they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry." *Head v. Hargrave*, 105 U. S. 45. The rule was applied in that case to the ascertainment of the value of professional services, where, if ever, the testimony of experts would be conclusive. In the ascertainment of the value of realty taken for public purposes, the Supreme Judicial Court of Massachusetts sustained a charge to the jury, "That, in estimating the amount of damages, if any of them knew of his own knowledge any material fact which bore upon the issue, he ought to disclose it, and be sworn and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses." *Patterson v. Boston*, 20 Pick. 159. In another case, in which the witness had testified as to the quality, condition, and cost of certain goods, and given his opinion as to their worth, the same eminent court said: "That the jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value". *Murdock v. Sumner*, 22 Pick. 156. The Supreme Court of Kentucky seems to have gone a step farther, and held that the jury may fix the price of property sued for from the description given by the witnesses, although the witnesses are themselves silent as to the price. *Craig v. Derrett*, 1 J. J. Mar. 366. And the Supreme Court of North Carolina seems to have held the same doctrine as to the province of the jury in estimating the value of services. *Madden v. Porterfield*, 8 Jones, 166.

In the case before us the witnesses give such a detailed description of the physical characteristics, qualities, and other conditions of the horse killed by the defendant, that perhaps the jury might from their general knowledge have approximated its value. They could certainly do so with more accuracy than they usually do in ascertaining damages in actions of tort. But, in addition, they had before them direct testimony of value in a neighboring market, if not at their own door, and might safely be trusted, from the data and their own general knowledge of the subject, "to fix the amount of the plaintiff's damage," as they have done. In this

view, and construing the language of the judge in connection with the facts, the charge was correct.

The judgment must, therefore, be affirmed.

Damages for Failure to Deliver Goods.—When a common carrier fails to transport goods to the point of destination, the damages usually recoverable are the value of the goods at that point, with interest from the time they should have been delivered, less the amount of the freight. *Whitney v. Railroad Co.*, 27 Wisc. 327; *Chapman v. Railroad Co.*, 26 Wisc. 295; *Northern Transportation Co. v. McClary*, 66 Ill. 233; *Sturgess v. Bissell*, 46 N. Y. 463; *Gray v. Packet Co.*, 64 Mo. 47; *Perkins v. Railroad Co.*, 47 Me. 573; *Hackett v. Railroad Co.*, 35 N. H. 390; *O'Hanlon v. Railroad Co.*, 6 Best. & S. 484; *Balt. & Ohio R. R. Co. v. Humphrey*, 9 Am. & Eng. R. R. Cas., 331.

JELLETT

v.

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. March 7, 1883.*)

The plaintiff contracted to sell to W. a car load of corn, to be paid for in cash before delivery, and which defendant, a common carrier, received "for account" of plaintiff, and subject to his order. W. had previously paid part of the purchase price only, and had not acquired title or right to the possession. Defendant delivered the corn to W. without plaintiff's consent and before payment of the balance. *Held*, a conversion of the corn, and that the measure of the plaintiff's damages was the full value thereof, with interest; but that defendant was entitled to allege and prove, in mitigation of damages, that subsequent to the conversion W. had paid and settled with plaintiff for the corn.

APPEAL from judgment of District Court, County of Ramsey.

R. J. Reid for respondent.

R. B. Galusha for appellant.

VANDERBURGH, J.—Plaintiff sues for the value of a car-load of corn, alleged to have been wrongfully converted by the defendant. The plaintiff had contracted with one Webb, to sell and deliver him the corn, to be paid for in cash before delivery. Webb paid \$70 of the price, but the balance, \$30.50, which was to be paid immediately, he neglected to pay. Whereupon plaintiff caused the grain to be shipped upon one of the defendant's cars for account of himself, in the name of Jellett & Co., under which he was transacting business, though he had no partner. The defendant delivered the corn to Webb at his request, but without the consent or direction of the plaintiff. There is no evidence of any further payment or offer of payment by Webb to plaintiff, or any settlement between them, or of any act of ratification by plaintiff of

such delivery to Webb. The title to the property must be assumed to be in plaintiff, as general owner. The defendant received the goods from the plaintiff's possession. This is sufficient evidence of title in the plaintiff, for the purposes of the action, in the absence of any evidence that the property was demanded or taken from the carrier by some one having a superior claim. The defendant could not, of its own mere motion, set up a want of title in the plaintiff. Story, Bailm. § 582.

The ownership and right of possession being in plaintiff, the delivery of the property to Webb before the payment of the balance of the price was unauthorized and wrongful, and amounted to a conversion. Upon the question of damages, the defendant contends that he should be allowed the amount paid by Webb on the corn, \$70, in reduction of plaintiff's damages, and that the court erred in not allowing defendant to amend his answer to conform to the facts proved. The general rule of damages in trover is the value of the property, with interest. This is modified in some instances by the relations to the property of the parties to the action. If the case is in such situation that the rights of both parties can be adjusted in the same action, and the plaintiff can be indemnified by a sum less than the full value, it may be so done and circuity of action be avoided. *Chamberlain v. Shaw*, 18 Pick. 283. Thus, where the plaintiff has a special property in goods, his damages as against the general owner is the value of his interest only. *Packet Co. v. Robertson*, 13 Minn. 293 (Gil. 269); *Dodge v. Chandler*, id. 120 (Gil. 105). But in an action by such plaintiff against a stranger, he will be entitled to the full value of the goods, holding the surplus over the amount of his own claim as trustee for the general owner. Sedg. Dam. *482.

And defendant may show, in mitigation of damages, any lawful application of the property or its avails to the use of the owner, though the latter is not a party to the suit, because the plaintiff is not answerable over in such case. *Becker v. Dunham*, 27 Minn. 32; *Squire v. Hollenback*, 9 Pick. 551-2; *Lowell v. Parker*, 10 Metc. 316-17; *Kaley v. Shed*, id. 319.

So, also, where the property has been returned and received by the plaintiff in the suit, or its proceeds have, by due process, gone to pay his debts. *Pierce v. Benjamin*, 14 Pick. 361; *Ball v. Liney*, 48 N. Y. 6; *Dailey v. Crowley*, 5 Laus. 301; *Bates v. Cartwright*, 36 Ill. 518; *Rosenfield v. Express Co.* 1 Woods, C. C. 131. And in general the right of the plaintiff in trover to recover the full value of the goods is subject to any lawful lien, claim, or interest which the defendant may have in them, to be adjudicated in the same action. The allowance of such matter in mitigation is an application of the doctrine of recoupment, where there is privity between the parties. *Parish v. Wheeler*, 21 N. Y. 511-12; *Russell v. Butler*, 21 Wend. 304; *Johnson v. Stear*, 15 C. B. (N. S.) 330;

Fowler v. Gilman, 13 Metc. 268; *Chinery v. Viall*, 5 Hurl. & N. 288; Sedg. Dam. *482, notes; *Chamberlain v. Shaw*, supra.

In the case at bar Webb had no title nor lien. There was no privity between defendant and him as respects any interest or claim of the latter, and defendant itself has no legal or equitable interest in the property upon which to ground any claim for limiting the recovery or modifying the application of the general rule of damages. *Nesbit v. Lumber Co.* 21 Minn. 493. The legal title to the corn was in the plaintiff at the time of the conversion. It was in defendant's possession, subject to plaintiff's order. Defendant wrongfully delivered it to Webb, to whose relations with the plaintiff defendant is a stranger. And it is not competent to adjust the differences between plaintiff and Webb in this action. *McMichael v. Morton*, 13 Pa. St. 215.

As respects the question of the privity necessary to entitle defendant to interpose such matter in mitigation, it is not entitled to insist upon the fact that it made a voluntary and unauthorized delivery of the corn upon a contract for its purchase. The property, its disposition and control, belonged to plaintiff. Defendant was responsible to plaintiff alone, and had no right to make a voluntary appropriation of it to another, and would accordingly be accountable under the issues, as they stand, for the full value. Redf. Carr. § 318; *Cram v. Bailey*, 10 Gray, 88; *Angier v. Paper Co.* 1 Gray, 621; *Brown v. Haynes*, 52 Me. 578.

Defendant will have a right of action over against Webb, and as to him it can only be determined, in an action between him and the plaintiff, what (if any) claim or equities he may still have remaining to be adjusted between them. In this way no one will be permitted to profit by his own wrong.

2. There remains to consider the question as to the propriety of the action of the court in striking out certain allegations in the answer, on plaintiff's motion before the trial, which defendant assigns for error. The measure of damages, as alleged and claimed by the plaintiff, is the value of the corn. The defendant denies the conversion, but not the value, and hence there was no issue raised by the pleadings as to the amount of damages unless by matter specially pleaded. So much of the answer as sets up facts going to show that there was no conversion, was rightly stricken out, because such facts were admissible in evidence under the denial of the conversion. But the allegations that subsequent to the delivery to Webb, and with full knowledge thereof, plaintiffs (Jellett & Co.) had received from him the full amount of the purchase price, were proper and material in mitigation of damages. Plaintiff was not bound to introduce any evidence of damages, the value being admitted. *Coleman v. Pearce*, 26 Minn. 123; s. c., 1 N. W. Rep. 846; *Moulton v. Thompson*, 26 Minn. 120; s. c., 1 N. W. Rep. 836. This rule is not uniform elsewhere, but it is well es-

established in this State. Pom. Rem. § 617. Defendant, admitting the value, but relying upon new and independent facts, occurring subsequent to the conversion, in mitigation of the damages, had no opportunity to prove them, under any issue tendered by the complaint. It was therefore proper that this should be alleged in the answer. *Evans v. Williams*, 65 Barb. 348.

Whether, if plaintiff, under a general allegation had been obliged to prove the amount of his damages, defendant might not have proved these facts in reduction of the amount claimed without pleading them, we need not consider. See *O'Brien v. McCaine*, 55 N. Y. 376.

That the evidence would have been material in mitigation, we have already shown. *Rosendale v. Express Co.*, 1 Woods, S. C. 131; *Torry v. Black*, 58 N. Y. 191.

We think, therefore, that it was error to strike out this portion of the answer and that for this cause the judgment should be reversed and the cause remanded for further proceedings.

Gilfillan, C. J., owing to illness, took no part in the decision of the case.

Misdelivery of Goods Amounts to Conversion.—A misdelivery of goods by a carrier equally with an entire failure to deliver them is deemed a conversion of the goods. *Hawkins v. Hoffman*, 6 Hill, 586; *Rosenfield v. Express Co.*, 1 Woods, 181; *Winslow Ward & Co. v. Vermont & Mass. R. Co.*, 42 Vt. 700; *Hall v. Boston & Worcester R. Co.*, 14 Allen, 439; *Southern Express Co. v. Dickson*, 94 U. S. 549; *Forbes v. Boston, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 76.

And this, though the carrier may have been deceived as to the identity of the consignee by fraud or forgery. *American Merchants' Union Ex. Co. v. Miller*, 73 Ill. 224; *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748; *Viner v. N. Y. Alex. & G. Co.*, 50 N. Y. 28; *Winslow Ward & Co. v. Vt. & Mass. R. Co.*, 42 Vt. 700; *Price v. Oswego & Syracuse R. Co.*, 50 N. Y. 213.

But see, *Ten Eyck v. Harris*, 47 Ill. 268; *Bush v. St. Louis, etc., R. Co.*, 8 Mo. App. 62.

Delivery to Agent of Consignee.—A delivery to the consignee's agent will not excuse the railroad company where the receipt of the goods is beyond his powers. *Wilson Sewing Machine Co. v. Louisville & N. R. Co.*, 71 Mo. 208; s. c. 6 Am. & Eng. R. R. Cas. 593; *Ela v. American Merchants' Union Express Co.*, 29 Wis. 611.

At least if the carrier knows of the agent's lack of authority. *Clafin v. Boston & Lowell R. Co.*, 7 Allen 341. But see, *S. & N. Ala. R. R. Co. v. Woods*, 9 Am. & Eng. R. R. Cas. 419.

Conditions Precedent to Delivery.—Where the carrier is not to deliver without the performance of some condition precedent as the presentation of an order or payment of the price, a delivery without the performance of such condition precedent amounts to a conversion. *Wright v. Northern Central R. Co.*, 18 Phila. 19; *Murray v. Warner*, 55 N. H. 546; *The Thames*, 14 Wall. 98; *Newcome v. Boston & Lowell R. Co.*, 115 Mass. 233; *Alderman v. Eastern R. Co.*, 115 Mass. 233; *Jeffersonville M. & I. R. Co. v. Irvin, et al.*, 46 Ind. 180; *McEwen v. Jeffersonville M. & I. R. Co.*, 33 Ind. 368; *Forbes v. Boston, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 76.

Negligence of Consignor.—Where the misdelivery takes place in consequence of the negligence or carelessness of the consignor, the carrier is of

course relieved from responsibility. *Southern Express Co. v. Kauffman*, 12 Heisk. 161; *Bush v. St. Louis R. C. & N. R. Co.*, 8 Mo. App. 62.

Other Matters.—As to other matters in connection with misdelivery, see *O'Dougherty v. Boston & Worcester R. Corp.*, 1 N. Y. Superior Ct., 477; *Union R. & T. Co. v. Siegel & Co.*, 73 Pa. St. 72; *Arrington v. Wilmington & W. R. Co.*, 6 Jones L. 68; *Rosenfield v. Express Co.*, 1 Woods, 181.

EDMUNDS et al.

v.

MERCHANTS' DESPATCH TRANSPORTATION CO.

(185 *Massachusetts Reports*, 283.)

If A., fraudulently assuming the name of a reputable merchant in a certain town buys, in person, goods of another, the property in the goods passes to A., and the seller cannot maintain an action against a common carrier, to whom the carriage of the goods is entrusted, for delivering them to A.

If A., representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A.; and, in an action by the seller against a common carrier, to whom the carriage of the goods is entrusted, for delivering them to A., the carrier cannot justify on the ground that he has delivered them to the owner.

THREE actions of tort, with counts in contract, against a common carrier, to recover the value of certain goods entrusted to the defendant by the plaintiffs, at Boston, for carriage to Dayton, Ohio. At the trial in the superior court, before Rockwell, J., the jury returned verdicts for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

A. Russ & B. Kimball for the defendant.

S. B. Allen (W. B. Allen with him) for the plaintiffs.

MORTON, C. J.—These three cases were tried together. In some features they resemble the case of *Samuel v. Cheney*, 35 Mass. 278. In other material features they differ from it. They also in some respects differ from each other. In two of the cases, a swindler, representing himself to be Edward Pape of Dayton, Ohio, who is a reputable and responsible merchant, appeared personally in Boston, and bought of the plaintiffs the goods which are the subject of the suits respectively. In those cases, we think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that

he was selling to any other person ; his intention was to sell to the person present, and identified by sight and hearing ; it does not defeat the sale because the buyer assumed a false name, or practised any other deceit to induce the vendor to sell.

In *Cundy v. Lindsay*, 3 App. Cas. 459, 464, where the question was whether a man, who in good faith had bought chattels of a swindler who had obtained possession of them by fraud, could hold them against the former owner, Lord Chancellor Cairns states the rule to be that, "if it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title."

In the cases before us, there was a *de facto* contract, purporting and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods. The sale was voidable by the plaintiffs ; but the defendant, the carrier by whom they were forwarded, had no duty to inquire into its validity. The person who bought them, and who called himself Edward Pape, owned the goods, and upon their arrival in Dayton had the right to demand them of the carrier. In delivering them to him, the carrier was guilty of no fault or negligence. It delivered them to the person who bought and owned them, who went by the name of Edward Pape, and thus answered the direction upon the packages, and who was the person to whom the plaintiffs sent them. *Dunbar v. Boston and Providence R. R.*, 110 Mass. 26. The learned judge who tried the cases in the superior court based his charge upon a different view of the law ; and, as the three cases were tried together, there must be a new trial in each.

It seems to have been assumed that the same questions are raised in each case. It is proper that we should add that the third case differs materially from the others. In that case, the contract did not purport, nor the plaintiffs intend, to sell to the person who was present and ordered the goods. The swindler introduced himself as a brother of Edward Pape of Dayton, Ohio, buying for him. By referring to the mercantile agency, he tacitly represented that he was buying for the Edward Pape who was there recorded as a man of means. The plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape. There was no contract made with him, because the swindler who acted as his agent had no authority, but there was no contract of sale made with any one else. The relation of vendor and vendee never existed between the plaintiffs and the swindler. The property in the goods, therefore, did not pass to the swindler ; and the defendant cannot defend, as in the other cases, upon the ground that it has delivered the

goods to the real owner. *Hardmann v. Booth*, 32 L. J. (N. S.) Ex. 105; *Kingsford v. Merry*, 26 L. J. (N. S.) Ex. 83; *Barker v. Dinsmore*, 72 Penn. St. 427.

Whether the defendant has any other justification or excuse for delivering the goods to the swindler is a question not raised by this bill of exceptions, and not considered at the trial; and therefore we cannot express an opinion upon it.

Exceptions sustained.

MISSOURI PAC. RY. CO.

v.

NEVIN.

(*Advance Case, Kansas. February 7, 1884.*)

Plaintiff shipped a car-load of ear corn over the road of defendant. The petition alleged that it was carefully selected for its peculiar value as seed corn, and that while in transportation the defendant, without the knowledge or consent of plaintiff, caused it to be run through an elevator and shelled, thus materially diminishing its value. *Held*, that it was not error to permit plaintiff to introduce testimony that he notified defendant before shipment that the corn was selected for seed purposes, and this notwithstanding there was no allegation in the petition of such notice.

Where witnesses testify as to the value of ear corn for seed purposes, it is not error to permit them to testify why shelled corn is of less value, even if in so testifying they state the reasons farmers give for refusing to purchase shelled corn for such purposes.

ERROR from Atchison County.

Everest & Waggener for plaintiff in error.

Smith & Solomon for defendant in error.

BREWER, J.—Plaintiff shipped a car-load of ear corn over the road of the defendant from Shannon, Kansas, to Gibson, Illinois. When the corn reached Atchison, defendant, without the knowledge or consent of plaintiff, caused the corn to be run through an elevator and shelled. The plaintiff had caused this corn to be carefully selected and was shipping it to an agent in Illinois to be there sold for seed purposes. The shelling of the corn materially injured its value for such purposes, and he brought this action in consequence to recover damages therefor.

Only two questions need to be considered. The bill of lading stated that it was ear corn, which was to be received and transported. The petition alleged that it had been carefully selected, and was of peculiar value for seed purposes. It did not specifically allege that plaintiff had notified the defendant of the object

for which the corn had been selected and was shipped. On the trial, over the objection of the defendant, he was permitted to show that he notified the defendant's agent at Shannon, before the shipment, that he was selecting and shipping it for seed purposes, and also that, while the corn was at Atchison, by his son, he notified the company's proper officers there that it was for seed purposes, and was not under any circumstances to be shelled. Of this defendant complains, claiming that the ordinary rule of damage is the difference between the value of a car-load of ear and one of shelled corn, and that if any special damages are to be recovered by reason of the special purpose for which the corn was designed and selected, it should have been notified in advance of such purpose, and if notice is necessary, an allegation of notice is also necessary. It is sought to bring this within the rule which obtains where an article is ordered from a manufactory to be manufactured for a special purpose. We think the objection not well taken. The rule of damage would be the difference between the value of this car-load of corn, of the kind and quality it was, and in the condition it was, for any purpose for which such a car-load of corn might ordinarily be expected to be used, and the value of that car-load of corn in the condition in which it was delivered for any uses to which it could ordinarily be put. If such a car-load of corn of that quality and kind, and in the ear, was worth \$1.25 per bushel in Illinois, by reason of its being specially fit for seed purposes, then that was the amount which he was entitled to receive as the proceeds of that corn if properly transported by the defendant. It cannot be said that the use of corn for seed purposes is so out of the ordinary and usual purposes for which corn is shipped that the defendant was entitled to special notice of such purpose. This corn being of better quality and more carefully selected than ordinary loads of corn, and being obviously such, as shown by the testimony, was of higher value; and whatever was its value for any purpose for which corn is ordinarily used, belonged to the plaintiff, and of it he could not be deprived by any wrongful act of the defendant. The defendant had no right to assume that it was intended merely for feeding stock or any use to which corn of inferior quality may be put. Being obviously of a higher grade, it was reasonable to be presumed that it was intended for some other and more important use. Further, it is evident that the defendant was in no way misled at the time of the trial as to the purposes for which this corn was bought and shipped; for the fact was expressly alleged in the petition, and the depositions of witnesses in Illinois on file before the trial also fully disclosed it.

The other question is this: Witnesses in Illinois testified by deposition to the value of corn in the ear for seed purposes, placing it much higher than that of shelled corn. Being asked the reason of the difference, they stated substantially that farmers

would not buy shelled corn for seed ; and further asked why this was, testified that the farmers' objections were that they could not examine the shelled corn so easily, and that the kernels were apt to be cracked and broken. We see nothing in this testimony which is open to just objection. Having testified to a large difference between the value of ear and shelled corn, it was but right that the reasons for such difference should be given ; and notwithstanding these reasons were substantially only the statements of farmers, yet it does not partake of the nature of hearsay, for the statements themselves were evidential facts. While the difference between the value of ear corn and shelled corn, as testified by the witnesses, seemed very large, and consequently the amount of the verdict also large, yet the testimony was all one way, and fully justified, if it did not compel, the verdict. The defendant offered no testimony, leaving the question of damages, as well as its liability, to rest upon the plaintiff's evidence.

We see nothing else that requires notice, and the judgment will be affirmed.

See *Cunningham v. Great Northern Ry. Co.*, and note, *infra*.

CUNNINGHAM

v.

GREAT NORTHERN RY. CO.

(49 *Law Times*, N. S. 394.)

A railroad company by mistake delivered empty casks to consignees which had contained turpentine when they should have delivered casks which had contained ketchup. The company's servants knew that the casks were to be refilled with ketchup. The consignees not knowing of the mistake refilled the casks with ketchup, which was spoiled. In an action by the consignees against the railroad company, *held*, that there could be no recovery for the loss of the ketchup.

APPEAL by plaintiff from judgment on demurrer.

The plaintiffs alleged that defendants were common carriers ; that Crosse and Blackwell were in the habit of sending empty casks by defendants' railway to plaintiff, which plaintiff filled with ketchup and returned ; that defendants, by their agents and servants, knew the purpose for which the casks were delivered to plaintiff ; that defendants negligently and improperly delivered to plaintiff, as Crosse and Blackwell's casks, certain other casks not belonging to Crosse and Blackwell, and which had contained turpentine ; that plaintiff, not knowing, or having reasonable means

of knowing, that the empty casks delivered were not Crosse and Blackwell's, filled them with ketchup which was spoiled.

BRETT, M. R.—In this case the question is, whether the statement of claim upon the face of it, assuming that the facts stated in it are true, shows any cause of action against the defendants. It shows no cause of action, unless it shows negligence on the part of the defendants towards the plaintiff, which makes them liable according to law. In order to show that there is such negligence, the statement of claim must show, either expressly or impliedly, that there was a duty from the defendants to the plaintiff to take reasonable care in respect of the matter charged against them, and that there was a breach of that duty. In the statement of claim there is an allegation of negligence, and therefore the question is whether there are sufficient circumstances disclosed to raise a duty on the part of the defendants to use reasonable care towards the plaintiff in respect of the negligence charged. Now, I myself am prepared to say that, whether the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or property, then there is a duty shown to use reasonable care. The question, therefore, comes to this: Are the circumstances stated sufficient to show that, if the defendants had thought about the delivery of the casks, they must at once have seen that unless they use reasonable care in that particular, there must, in all probability, be injury to the plaintiff's property. That which the defendants are charged with having done negligently here is not that they delivered casks which were not the casks of Crosse and Blackwell, because to say that if they thought at all they must see that any casks other than Crosse and Blackwell's must, in all probability, injure the plaintiff's property is too wide, and amounts to that which cannot be supported at all. Therefore, what is really charged against them is this, that their negligence consisted not in the non-delivery of Crosse & Blackwell's casks, but in the delivery of casks which contained the dregs of turpentine. That is what they are charged with. Therefore, the question is, do the circumstances disclose any duty on the part of the defendants to take reasonable care not to deliver to the plaintiff turpentine casks? Now, to apply the rule which I have endeavored to lay down it comes to this: Can it be truly said, upon the facts stated in this statement of claim, that if the defendants had thought about the delivery of turpentine casks they must have come to the conclusion that, unless they took reasonable care not to deliver turpentine casks, there must, in all probability, be an injury to the plaintiff's property? Now, it is stated that the defendants by their servants

knew the purpose for which empty casks sent back to the plaintiff were sent, and knew that the purpose for which they were sent would be such that if the thing was put into turpentine casks there must be danger. But when you are considering this alleged duty to take reasonable care, you must try the case at the point of time when the breach of duty is charged. You charge the defendants with a breach of duty, with negligence with regard to a duty. You must fix your attention upon the point of time when if there was a breach, that breach took place, in order to see whether at that moment of time the duty existed. Therefore it is useless to look at the sixth paragraph here to gather anything from that, because that is what happens after the alleged duty has existed on the part of the defendants, and after the breach of it. The breach of duty of which the defendants are supposed to have been guilty is at the moment of the delivery of the casks to the plaintiff. Now is it true to say then that if they had thought at all they would have thought this: "If we deliver turpentine casks there must in all human probability be injury to property;" can anybody affirm that proposition? In order to do so you must affirm this—that if they had thought at all they were bound to think that the plaintiff would use the casks without examining them, so as to see that they were turpentine casks. Can anybody say that, in the ordinary course of any business, casks which are to be sent empty for the purpose of being filled with something, would not be examined at all so as to discover whether there was in those casks such a thing as the dregs of turpentine? It seems to me impossible to affirm that, and unless you can affirm that, you do not show that, if the defendants had thought of the duty which is alleged against them, they must have seen that if they acted negligently there must be injury to the plaintiff's property. The case, therefore, although I do not say it is far from the line, is wanting in an allegation of fact to my mind to bring it within the line. Then it is said that the case of *Dickson v. Renter's Telegraph Co.*, 35 L. T. Rep. N. S. 842; 2 C. P. D. 62, aff. in Court of Appeal, 37 L. T. N. S. 370; 3 C. P. D. 1, shows that in this case there was no duty. To my mind it shows nothing of the kind. In *Dickson v. Renter's Telegraph Co.* there was no duty alleged. That is all it shows. It was a perfectly clear case. How anybody could suppose that a telegraph company (if they thought at all about the misdelivery of telegrams) were bound to come to the conclusion that, whatever telegram they misreported there must be an injury to the person to whom it was misreported, is perfectly idle. Then we come to the case of *George v. Skivington*, 21 L. T. Rep. N. S. 495, L. R. 5 Ex. 1, I am prepared to say that, in my opinion, *George v. Skivington* was rightly decided. It appears to me to come strictly within the rule which I have laid down. The negligence there charged was this—delivering, for the use of a female a hair-wash

made up of deleterious compounds, which deleterious compounds, it was assumed, must injure her if she used it in that form. Therefore, if the chemist had thought like a reasonable man at all, he could not have helped coming to the conclusion: "If I am careless in delivering a compound which I profess to deliver as a hair-wash, and if I am so careless that I deliver some deleterious stuff—although it is possible it may not do harm, although it is possible that it may not be used (as, for instance, although it is possible that when the lady takes it in her hands she will drop the bottle or spill it, and so will not use it)"—yet, if he thought at all, he must come to the conclusion that, "in all probability, if she buys it for this purpose, she will use it; and it is impossible to suppose she could examine whether it is a deleterious compound or not, because that would require an analytical chemist;" and therefore, if he thought at all, he must have seen that if he was careless to the extent charged against him, in all probability there must be injury. To my mind the case was rightly decided. Then we come to the case of *Parry v. Smith*, 41 L. T. Rep. N. S. 94, 4 C. P. Div. 325, and there the negligence charged is this—so negligently leaving gas in a cellar that, when a person goes into the cellar he will find the cellar full of escaped gas, and will be blown up. Now, it must be obvious, I think, to anybody, that, if the person who is charged with negligence had thought at all, he must have come to the conclusion—it is inevitable—that, if he was careless to the extent charged against him—that is, if he did not take reasonable care to prevent the escape of the gas into the cellar so as to fill it, he was bound to assume that some one would, sooner or later, go into that cellar while it was charged with gas; and that, if he did, it was next to impossible but that he would be blown up. Therefore, it is a case precisely, to my mind, on all-fours with what I consider to be the facts stated in *George v. Skivington*. I consider *George v. Skivington* and *Parry v. Smith*, both rightly decided upon the right rule. But what I have to say about this case is, that there is so great a defect in the statement of facts as not to bring the case within that rule; and therefore, in my opinion, this statement of claim cannot be supported. But let it not be supposed that I at all agree with the stringency of the rule laid down by Cave, J., or that I can bring my mind to agree that there must have been "a breach of some contract, or that the defendant must have been guilty of some fraud or reckless misrepresentation." It seems to me that there may be a duty, and a breach of duty, and a cause of action which falls short of any one of those three propositions; if any one of those three propositions is true, there is a cause of action; but there is a cause of action for neglect of duty, larger and wider than any one of the three.

1. **Fry, L. J.**—I entirely agree. It appears to me that the plain-
16 A. & E. R. Cas.—17

tiff's case may be put in the most favorable manner to him by looking at it from two points of view: First, as an action for negligence, and, secondly, as an action for misrepresentation; the negligence alleged being negligence in delivering wrongly and improperly certain casks, and the misrepresentation being in alleging or representing that those casks were the casks of Crosse and Blackwell. Now, first, with regard to the negligence, it is plain that in this case the right to sue on the ground of negligence cannot arise from contract, because there is no contract between the plaintiff and the defendants on this point. The action, therefore, must be rested upon duty; and the inquiry is, whether the defendants owe any duty to the plaintiff. It appears to me that one may lay down with some safety that, where a man without contract does something to another man, and the first man knows that if he does the act negligently that negligence will in all probability produce injury to the person or property of the second man, there the first man owes the second a duty to do the act without negligence. I am doubtful whether one could carry duty further in cases in which there is no contract; at any rate, it appears to me that that proposition is the one which is to be considered in the present case. Now, it appears to me that the statement of claim is defective in not showing that the defendants knew that if they did the act of delivering casks with negligence, they would in all probability produce injury to the property of the plaintiff. I inquire how the case stands upon the ground of misrepresentation, namely, the misrepresentation that these casks were Crosse and Blackwell's casks. The law, I take it, stands in this way: A mere innocent misrepresentation will not give a cause of action, unless it be made with the intention of being acted upon in a particular way, and being so acted upon leads to injury. Now, in the present case, it appears to me that the statement of claim is defective in not showing that it was known that the representation would be acted upon by the casks being used, as they were; the injury resulted, not from the user of the casks, but from the user of the casks in the condition in which they were when they were delivered; and I fail to see any allegation sufficient to make it clear that the representation was made with the intention of being acted upon by using the casks in the condition in which they were at the time of delivery. The case does not appear to me to be very far from the border line; but it appears to me that upon the allegations in the present statement of claim there is no ground of action.

Judgment affirmed.

Special Damages Occasioned by Loss of Goods or Delay in Transportation.—Where special damage occurs in consequence of the failure of a carrier to deliver goods within a reasonable time, he is not responsible for any damages other than those which he could reasonably have foreseen would occur,

taking all the circumstances into account. *Hadley v. Baxendale*, 9 Exch. 349; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Medway v. N. Y. & Erie R. Co.*, 26 Barb. 564; *Balt. & Ohio R. R. Co. v. Humphrey*, 9 Am. & Eng. R. R. Cas. 381.

Where the carrier has notice of the special circumstances he will be held liable for all the damages which that notice might reasonably inform him would ensue. *Home v. Midland R. Co.*, L. R. 8. C. P. 131; *Priestly v. Northern I. & C. R. Co.*, 26 Ill. 205; *Illinois Central R. Co. v. Cobb*, 64 Illinois, 128; *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627; *Chicago, B. & Q. R. Co. v. Hall*, 83 Ill. 360; *Great Western R. Co. v. Redmayne*, L. R. 1. C. P. 329; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Gee v. Lancashire & Yorkshire R. Co.*, 6 H. & N. 211; *King v. Woodbridge*, 34 Vt. 565; *Missouri Pac. R. Co. v. Nevin*, *supra*.

Loss of Contracts.—The loss of an existing contract may be compensated for in damages. *Priestly v. Northern Ind. & C. R. Co.*, 26 Ill. 205; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Frazer v. Smith*, 64 Ill. 128; *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360; *Harvey v. Connecticut & P. R. Co.*, 124 Mass. 421.

Remote Speculative Damages.—There can be no recovery for damages which are evidently remote and speculative. *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318; *Ingledew v. Northern R. Co.*, 7 Gray 86; *Penna. R. R. Co. v. Titusville Plank Road Co.*, 71 Pa. St. 350.

TEXAS CENTRAL RY.

v.

MORRIS.

(*Advance Case, Texas. 1883.*)

A stipulation contained in a contract between the railroad and the shipper, before shipment of the cattle, that before the shipper would be entitled to recover any damages for loss, or injury, which might occur to his stock while in transit, he should first give notice of his claim for such damages in writing, to some officer of the railroad, or nearest station agent, before the stock was moved from the place of destination, or place of delivery, and before said stock was mingled with other stock, is legal and binding.

WHITE, P. J.—By an express stipulation contained in the contract between Morris and the railroad agent, before the cattle were shipped, it was made a condition precedent that before Morris would be entitled to recover any damages for loss or injury, which might occur to his stock whilst in transit, he should first give notice of his claim for such damages, in writing, to some officer of the railroad, or nearest station agent, before the stock was moved from the place of destination, or place of delivery, and before said stock was mingled with other stock. Such a stipulation by the railroad with regard to the shipment of stock and its liability for damages, has been directly adjudicated in this State as to its validity, and has been held legal and binding. *Missouri Pacific Ry. v. Jerome*

Harris; opinion by the Commissioners of Appeals, Austin term, April 18, 1882.

It was claimed by the plaintiff that the damages of which he complained occurred at Waco; that he had notice of them at Fort Worth, Tex., and that when his attention was called to his damages he mentioned the same to a stranger, who happened to be present, and he was advised by the stranger to give notice to the company therefor, that his hands were too much soiled to write, so he took out his memorandum-book and asked the man to write for him; that the man did write at his (Morris') dictation, and the note was then put in a stamped envelope and sealed by witness and directed to the agent of the Houston and Texas Central R. R., at Waco; that witness saw an old friend of his by the name of Bond, and who was yardmaster at Fort Worth of the Missouri Pacific Ry., standing some distance off, and he (witness) went to Bond and handed him the letter, and asked him to mail it; that he did not tell Bond its contents, nor did Bond know its contents; that he (witness) left with his train a few minutes afterward, and does not know whether or not Bond mailed the letter; that witness did not mail the letter in person because he did not have time to do so before the train left.

Bond was not introduced as a witness on the trial of the case, either in person or by deposition, to prove that he had mailed the letter, and defendant proved by the witness, Gibson, its station agent at Waco, that he never had received any notice in writing, or otherwise, from the plaintiff, in regard to the cattle, or any damage thereto, or claim therefor.

We are of opinion that the evidence wholly fails to show that such notice in writing was ever given by the plaintiff to the defendant, or any of its officers, agents or servants, in compliance with his stipulation in the contract.

We are further of opinion that there is no evidence of a legal character which would warrant the jury in finding that the cattle had in fact lost flesh and weight from Albany, the place of shipment, to Chicago, the place of destination. At Chicago the cattle were weighed, but the testimony, neither of the weigher nor of the clerk who took down the weights in Chicago, was adduced on the trial, and this certainly was the best evidence to prove the weights at Chicago. Because the verdict and judgment are not supported by the evidence the judgment is reversed and the cause remanded.

Reversed and remanded.

Limitation of Time within which Claim for Damages Must be Presented.—Conditions have frequently been sustained in contracts of carriage requiring claims for damages to be presented within a certain time. *Southern Express Co. v. Caperton*, 44 Ala. 101; *Porter v. Southern Express Co.*, 4 S. C. 135; *Westcott v. Fargo*, 61 N. Y. 452; *Place v. Union Express Co.*, 2 Hilton, 19; *Capehart v. Seaboard, etc., R. Co.*, 77 N. C. 255; *Weir v. Express Co.*, 5

Phila. 355; Southern Express Co. v. Hunnicutt, 54 Miss. 566; Adams Express Co. v. Reagan, 29 Ind. 21; United States Express Co. v. Harris, 51 Ind. 127; Squire v. N. Y. Central R. Co., 98 Mass. 239; South & N. Ala. R. Co. v. Henlein, 52 Ala. 606; Newburger v. Express Co., 6 Phila. 174; Macklin v. New Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229; Browning v. Long Island R. Co., 2 Daly, 117; Christian v. St. Paul, etc., R. Co., 20 Minn. 21.

As to such conditions in contracts for the carriage of live stock, see Goggin v. Kansas, etc., R. Co., 12 Cas. 416; Rice v. Kansas, etc., R. Co., 63 Mo. 314; Oxley v. St. Louis, etc., R. Co., 65 Mo. 629.

SNIDER

v.

ADAMS EXPRESS CO.

(77 Missouri Reports, 528.)

The plaintiff, having sold land as agent of the owner and received the purchase money, delivered the latter to an express company for transportation to the owner. It was lost in transit. *Held*, that the plaintiff could maintain an action for its recovery. He was the "trustee of an express trust," within the meaning of section 3463, Revised Statutes 1879.

APPEAL from Cedar Circuit Court.

This was a suit by Henry J. Snider to recover damages for failure to deliver money alleged to have been placed in the care of the express company for transportation. At the trial plaintiff gave evidence tending to show that, as agent for his brother Andrew Snider and his sister Louisa J. Snider and several other persons, he sold a tract of land and received the purchase money; that he divided this money according to the interest of each, put the share of each into an envelope by itself, marking the envelope with the name of the owner, and placed them all in a large envelope; that he then deposited the latter with the express company with directions to deliver the same to said Andrew Snider, taking a receipt in the usual form and paying charges of transportation with money reserved out of the fund; that all the beneficiaries lived in the same town; that the package was duly delivered to said Andrew, but upon being opened the envelope containing the share of said Louisa was found to be missing. This was the money sued for. The court sustained a demurrer to this evidence, and plaintiff took a non-suit with leave to move to set the same aside. In due time this motion was made and overruled, and plaintiff brought this appeal.

E. E. Kimball and E. J. Smith for appellant.

Plaintiff is the proper party to bring this suit. Defendant agreed with him to convey the money safely, and from him received the fee therefor. *Blanchard v. Page*, 8 Gray, 281; *Hooper*

v. Railroad Co., 27 Wis. 81; s. c., 9 Am. Rep. 439; *Southern Express Co. v. Craft*, 49 Miss. 480; s. c., 19 Am. Rep. 4; *Grinnell v. Schmidt*, 2 Sandf. 706; *Robbins v. Deverill*, 20 Wis. 148; *Joseph v. Knox*, 3 Camp. 320; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Davis v. Harness*, 39 Ohio St. 332; s. c., 22 Am. L. Reg. 213. His right of action on the contract is not affected by the provision of the code which requires every action to be brought in the name of the real party in interest. The consignor is a party in interest to the contract, and it does not lie in the carrier, who made the contract with him, to say, on a breach of it, that he is not entitled to recover the damage, unless it be shown that the consignee objects, for without that it will be presumed that the action was commenced and prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor is by the operation of the rule regarded as a trustee of an express trust, like a factor or other mercantile agent, who contracts in his own name on behalf of his principal. *Denver, etc., R. R. Co. v. Frame* (Supt. Ct. Colorado), 16 Cent. L. J. 337; s. c., 1 Denver L. J. 66.

The consignee, Andrew Snider, had and has no possible interest in the subject matter of this suit. He was not a party to the contract of carriage, and had he received the money sent to him, he would simply have been charged with the duty of delivering it to Louisa to whom it belonged, according to the instructions sent by plaintiff. On the other hand, Louisa never authorized the money to be sent in any way. Plaintiff assumed all risk of loss, and Louisa could maintain an action against him for the money. Therefore he is the real party in interest here. *Stewart v. Frazier*, 5 Ala. 114; *Kowing v. Manly*, 49 N. Y. 192; s. c., 10 Am. Rep. 346; *Jenkins v. Bacon*, 111 Mass. 373; s. c., 15 Am. Rep. 33.

Blair & Perry for respondent.

Plaintiff is not the trustee of an express trust. An express trust is created by an instrument that points out directly and expressly the property, persons and purposes of the trust. And as they are directly declared by the parties there can never be a controversy whether they exist or not. Such a trust cannot be proved by parol, and can only be created by writing. *Perry on Trusts* (3 Ed.), §§ 24, 79, 82. Louisa J. Snider is the real party in interest, and the suit should have been brought in her name. *Williams v. Whitlock*, 14 Mo. 553; *Hutchings v. Blackford*, 35 Mo. 285; *Weise v. Gerner*, 42 Mo. 527; *Wallhormfechtel v. Dobyns*, 32 Mo. 310; *State v. Anderson*, 5 Kas. 115; *Railroad Co. v. Wheaton*, 7 Kas. 232; *Coffman v. Parker*, 11 Kas. 12; *State v. Jefferson Co.*, 11 Kas. 66; *Humphreys v. Keith*, 11 Kas. 108; *Schnier v. Fay*, 12 Mo. 184; *Crowell v. Ward*, 16 Kas. 60. The person for whose use a contract for carriage is made is the proper one to sue for its breach, though it is not made with him. *Angell on Carriers*, §§ 495, 497, 506; *Hooper v. Railroad Co.*, 27 Wis. 81; *Magru-*

der v. Gage, 33 Md. 344; s. c., 3 Am. Rep. 177; Krulder v. Ellison, 47 N. Y. 37; s. c., 7 Am. Rep. 402; Thompson v. Fargo, 49 N. Y. 188; s. c., 10 Am. Rep. 342.

SHERWOOD, J.—The controlling question in this case is, whether the plaintiff is the proper party to sue, the answer denying that he is the proper party.

It is quite clear from the testimony, that the plaintiff was acting as the agent of his sister, Louisa J. Snider, in collecting and forwarding the money arising from the sale of her interest in the land. The contract with the defendant company, for the transmission of the money, for the loss of which suit is now brought, was made by plaintiff, in his own name, without mention of any one as beneficiary of such contract. If so, then it was competent for the agent, with whom the contract was actually made, to sue in his own name, or for his undisclosed principal, with whom in point of law the contract was made, to sue in her own name. Cothay v. Fennell, 10 B. & C. 671; s. c., 21 E. C. L. 146; Story on Agency, §§ 160, 270, and cases cited; Ferris v. Thaw, 72 Mo. 446. In Blanchard v. Page, 8 Gray, 281, the same view as that just announced is stated, and it is there held after an extensive and elaborate review of the authorities, by Shaw, C. J., that a consignor was the proper party to sue, though having neither a general nor special property in the goods.

But it is urged that under the code the action must be "prosecuted in the name of the real party in interest." R. S. 1870. § 3462. But there are exceptions to this rule, expressly made in the section quoted, and set forth in the section following. Among those exceptions is that of a trustee of an express trust, who may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. In the language of the section referred to, "A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

It is claimed by counsel for defendant that there is no express trust in the case, because such trust must point out with precision the subject, the persons and the purposes of the trust, cannot be proved by parol, and can only be manifested or proved by some writing. Whatever of truth there may be in this position regarding trusts as to realty, it is not true regarding personal property; for such property is not within the terms of the statute, and such trusts, consequently, may be declared and proved by parol. The point has been so decided inferentially in England, and directly decided in this way in this country. 1 Perry on Trusts, § 86, and cases cited.

But we need not search the text books in the endeavor to maintain in the present instance that the plaintiff is the trustee of an

express trust, since, under the terms of the statute, the circumstances of this case endow him with all the attributes pertaining to that character: (1) He is the person with whom, and in whose name, the contract now in suit was made. (2) He made the contract for the benefit of another, as shown by the evidence adduced.

It was held at an early day in this State, that a party to whom a note had been assigned merely for the purpose of collection, was the "real party in interest," within the meaning of the statute; that the assignment created in the assignee the legal interest and thereby he became the proper party to sue. *Webb v. Morgan*, 14 Mo. 429. This ruling was followed in the similar case of *Beattie v. Lett*, 28 Mo. 596, where the one just mentioned was approvingly cited and followed, and the remark made that the assignees had the right to maintain an action on the note in their own names, "because they were the trustees of an express trust, and had the legal title to the note." So, also, in *Simmons v. Belt*, 35 Mo. 461, in similar circumstances, the above case was cited with approbation; and in *Nicolay v. Fritschle*, 40 Mo. 67, where it was held that though the sum mentioned in the note was not due the plaintiff, yet that he being the payee mentioned therein; having possession of the notes and the legal title thereto, that he had such an interest as authorized him to sue; that if the notes were impressed with a trust in his hands, that trust could subsequently be asserted; that the fact that such a trust existed constituted no defence to the action, and that a judgment was properly rendered as if for want of an answer, where the answer set up the facts aforesaid.

Now, if a contract originally made in the name of another, by an assignment thereof, which confers no beneficial interest—which makes the party to whom made the mere naked depository of the legal title—can endow the assignee with rights as the real party in interest—can clothe him with the attributes of a trustee of an express trust—assuredly a party with whom, and in whose name the contract was originally made, for the benefit of another, should encounter no legal obstacle in maintaining an action in his own name on the contract thus made. And so the point has been ruled; as in the case where a written contract was made with an administrator of an estate, and upon his resignation as such, action being brought by the administrator de bonis non, it was ruled that under the new code of procedure, the contract, if made with the original administrator for the benefit of the estate, he, as the trustee of an express trust, was the proper party to sue. *Harney v. Dutcher*, 15 Mo. 89. And in *Rogers v. Gosnell*, 51 Mo. 466, it was held, that under the statute the party in whose name a contract was made, for the benefit of another, might maintain action upon it, being the trustee of an express trust, and that the bene-

ficiary might, also, do the like, as a recovery by either would be a bar to another action by the other. See, also, Bliss on Code Plead., §§ 45, 46.

It only remains to say that the plaintiff can maintain his action. Therefore, judgment reversed and cause remanded. All concur.

When Consignor may Sue for Loss of Goods.—When it appears that the title to the goods entrusted to the carrier remains entirely in the consignor, he is the proper party to bring suit in case of loss or injury. *W. & A. R. R. Co. v. Kelly*, 1 Head. 158; *O'Neill v. Railroad Co.*, 60 N. Y. 188.

When Consignee may Sue.—Ordinarily, however, the delivery to the carrier is presumed to carry the title with it, and the consignee is therefore generally the sole person entitled to bring suit. *Everett v. Saltus*, 15 Wend. 474; *Canfield v. Northern R. Co.*, 18 Barb. 586; *Bonner v. Marsh*, 10 Sm. & M. 376; *White v. Vann*, 6 Humph. 70; *Gwyn v. Richmond, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 452.

The general principle is that the party in whom the beneficial interest is vested is the proper party to bring suit.

JONES

v.

GRAND TRUNK RY. CO.

(74 *Maine Reports*, 356.)

In an action for damages against a railroad company for unreasonable delay in the transportation of merchandise where a portion of such unreasonable delay occurred more than six years prior to the date of the writ and continued so that a portion of the delay was within the six years: *Held*, That whatever damage was occasioned by such delay as occurred more than six years before the commencement of the suit was barred, but such damage as was occasioned by inexcusable delay within that time was recoverable.

ON exceptions.

An action on the case brought by the surviving partners of the firm of Blake, Jones & Co., to recover damages for unreasonable delay in the transportation of several lots of flour, amounting in all to four thousand two hundred and twelve barrels, shipped over the defendants' road in the fall of 1866. Of this quantity twelve hundred barrels arrived at destination subsequent to December 24, 1866.

The writ was dated December 24, 1872. The plea was general issue and statute of limitations. The verdict was for two thousand and forty-seven dollars, and defendants alleged exceptions.

The opinion states the material facts.

Charles F. Libbey, for the plaintiffs, cited, upon the question considered in the opinion: *Betts v. Norris*, 21 Maine, 324; *Bank of Hartford County v. Waterman*, 26 Conn. 324; *Hardy v. Ryle*,

9 B. and C. 608; *Brotherton v. Wood*, 3 Brod. and Bing. 4 (54 E. C. L.); *Angell, Lim.* (6th ed.) 320, 321; 2 Redf. Rys. (4th ed.) 14. J. and E. M. Rand, for the defendants.

It appears that all the flour was (from some cause which defendants are now unable to explain) a long time in transit. It should have arrived and been delivered to plaintiffs in the month of October, 1866, except two lots due November 9 and 17. We submit that the plaintiffs' several causes of action accrued at the expiration of the time when the several lots of flour ought to have arrived; that all accrued prior to November 20, 1866. Yet plaintiffs did not commence their action until December 24, 1872, more than six years after their several causes of action accrued. And that their entire claim is barred by the statute of limitations.

We think it is quite clear that plaintiffs' cause of action accrued at the expiration of a reasonable time for the transportation and delivery of the flour; that they could then have commenced their action; and that the failure to commence an action within six years of such expiration bars all claim. That such is the well-settled law. The elementary works all lay it down as a settled principle that the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned; that the statute begins to run from the breach of duty, and not from the damage thereby occasioned.

If one is guilty of negligence whereby injury occurs, six years from time of neglect will bar the action, although the injury has occurred within the six years. 3 Parsons, Contracts, part 2, sec. 6.

In *Wilcox v. Plummer*, 4 Peters, 172, the court say, the question is whether the statute runs from the time the action accrued, or from the time that the damage is developed or becomes definite. And court say, it is well settled that it runs from time action accrued. See also, *Angell on Limit.* secs. 42, 136, 137, 141, and cases there cited; *Battley v. Faulkner*, 3, B. and A. 288.

Plaintiffs were not obliged to receive the flour after the expiration of a reasonable time for its transportation and delivery;—could immediately have sued for its value,—and its receipt afterward would have affected amount of damage. Suppose flour never had arrived and never been delivered; when would plaintiffs have had a right of action? We apprehend, at the expiration of a reasonable time for its transportation and delivery.

WALTON, J.—The only question is whether the plaintiffs' claim is barred by the statute of limitations. It is a claim to recover damages for delay in the transportation of flour. The plaintiffs shipped several lots of flour during the fall of 1866. All of it ultimately arrived and was delivered to the plaintiffs; but none of it arrived in season. Some of it arrived more and some of it

less than six years before the commencement of the suit. The plaintiffs concede that their claim for damages, with respect to so much of the flour as arrived more than six years before the commencement of the suit, is barred. The defendants claim that it is barred with respect to the remainder, because the delay had become unreasonable, and, consequently, a right of action had accrued, more than six years before the commencement of the suit. They contend that the subsequent delay—that is, the delay within six years—can have no other effect than to enhance the damages. The plaintiffs, on the contrary, contend that the wrong was a continuing one; and that, it having been continued till within six years of the commencement of the suit, the action is maintainable.

We think the plaintiffs' view is the correct one. It must be remembered that the defendants had possession of the plaintiffs' property. So long as it was negligently withheld, so long, the plaintiffs were wrongfully deprived of the use of it. It is not a case where the wrong is complete as soon as the delay becomes unreasonable. It is not a case where the lapse of time only makes manifest the injury which had before been committed. It is the case of a continuing wrong. Every day's delay may be the cause of additional damage. Every day's continuance of the delay, like the continuance of a nuisance, or the continuance of a trespass, by occasioning new damage, creates a new cause of action. One day's delay may occasion little or no damage. Another day's delay may create great damage. Whatever damage is occasioned by such delays as occurred more than six years before the commencement of the suit, is, of course, barred. But such damage as has been occasioned by inexcusable delays within that time, may, we think, be recovered. Such, in substance, was the ruling of the judge who presided at the trial. We think the ruling was correct.

Exceptions overruled.

Judgment on the verdict.

SOUTH AND NORTH ALABAMA R. R. Co.

v.

WOOD.

(71 *Alabama Reports*, 215.)

Where, in an action against a railroad company, as a common carrier, to recover damages for the failure to deliver a quantity of corn received by it for transportation to a designated point on the road, at which there was neither depot nor agent, it was shown that the corn was received by the company and transported in good condition to the place of destination, and

the car in which it was shipped, was placed on a side-track for the consignee, where it remained for several days, with no one in charge of, or protecting it, and that when the corn was taken from the car and measured, there was a deficiency in quantity, *held*, that the burden of proof was on the plaintiff to show that the loss occurred between the time when the corn was received by the company, and the time when the car containing it was left on the side-track, that being, under the facts of this case, a delivery, and not on the defendant to show that the loss occurred after the car was placed on the side-track.

Charges to the jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof.

APPEAL from Blount Circuit Court.

This case was before this court at a former term, and is reported. *South & North Ala. R. R. Co. v. Wood*, 66 Ala. 167; s. c., 9 Am. & Eng. R. R. Cas. 419. It was an action brought by the appellee against the appellant, a railroad corporation, to recover damages for the failure to deliver seventy-five bushels of corn in the shuck, alleged to have been delivered to it for transportation. The defendant pleaded to the general issue, "in short by consent, with leave to give in evidence any special matter which might be good, if properly and well pleaded;" and the cause was tried on issue joined thereon, the trial resulting in a verdict and judgment for the appellee. The facts sufficiently appear in the opinion.

Thos. G. Jones and Rice & Wiley for appellant.

Hamill & Dickinson contra.

STONE, J.—In the general charge given to the jury in the present case, they were informed that the liability of the railroad terminated when the car, containing the corn, was delivered at the point of destination. The testimony shows that the agreed place of delivery was Smith's mills, a private siding, and not a station on the road. No one was there, or expected to be there, to receive the corn. The testimony tends to show that the car, containing the corn, stood on the siding at Smith's mill as much as seven or eight days, where no one was in charge of it, or protecting it. The testimony tends to show, also, and the jury so found, that when the corn was received by the railroad company, there were three hundred bushels, and that when it came to be measured out there were only two hundred and twenty-four 50–100 bushels. With the finding of the jury, or whether the evidence justified it, we have nothing to do. There are rules for ascertaining how many bushels of corn, in the condition this was in, a car of given dimensions would hold, and, of course, for ascertaining how much would half fill it, or fill it two thirds full. But, as we have said, we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them. The court,

among other things, charged the jury, that "in the case of goods delivered to common carriers, for carriage, when there is a loss or damage of the goods, the burden of proof is always on the carrier, to show that his liability terminated before the loss or damage in question occurred." Bearing in mind that the liability of the railroad, as a carrier, terminated when the car was left at Smith's mill, the effect of this charge was to tell the jury, as an independent proposition, that the burden was on the railroad, to prove that the quantity of corn was in the car when it was left on the side-track. and this, without any predicate of proof, or fact, that the quantity in the car was then deficient; in other words, that if the proof showed there were three hundred bushels when the railroad received the corn, then the liability of the railroad was fixed, unless it, the railroad, proved it delivered three hundred bushels. Thus construed, the only fact necessary to be proved by the plaintiff, according to the charge, was, that the railroad received the corn. The burden would then shift, and the railroad would be required to prove, either that the corn was not lost or abstracted while in its possession, or that it was lost after the car left its possession by being placed on the side-track.

In ordinary cases, freight received by a railroad, for transportation, is to be delivered at one of its stations. The road having an agent at such station, who receives the freight from the train, and delivers it to the consignee, there will, ordinarily, be little or no contest over the matter of delivery. There being, in such case, no intermediary agency, the question of delivery *vel non* is one of simple, naked fact, and susceptible of easy proof. Hence, few controversies are likely to arise on that question. But when, as in this case, there is an intervening period between the time when the railroad rightfully parts with the possession, and the consignee takes actual control—a time when no one exercises actual watch and ward over the freight—it is not unreasonable that disputes should arise, as to when the loss did actually occur. It becomes material to inquire, what proof it was necessary for the plaintiff to make, before the onus was shifted to the defendant. Speaking on this subject, Greenleaf, in his work on Evidence (vol. 2, § 213), says: "If the loss or non-delivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character." In Hutchinson's excellent treatise on Carriers (§ 764), the principle is thus expressed: "Although the claim of the plaintiff, in an action for the loss of the goods, may rest upon negligence, or non-feasance, and not upon a positive misfeasance, and would, therefore, seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss, notwithstanding its negative character; and if it be out of his power to show positively the loss of the

goods, he must at least show such circumstances as would create the inference against the defendant that they had been lost; as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them, to whom they were consigned." As thus stated, the law casts on the plaintiff the duty of proving non-delivery. *Woodbury v. Frink*, 14 Ill. 279.

We think much light is shed on this question, by the rule which obtains where freight is received by one railroad company, to be transported over its road, and then delivered to another line running in continuation, and, possibly, to be delivered successively from road to road, until it reaches its destination. We do not gainsay the rule, that when the road receiving such freight stipulates for its delivery at the point of destination, although beyond the terminus of its road, then the owner or consignee can hold the first road responsible for the non-delivery at the point of destination, no matter on which intervening road the loss occurred. *Mobile & Girard R. R. Co. v. Copeland*, 63 Ala. 219. But when, by the terms of the contract, the receiving railroad stipulates to transport to its terminus, and there to deliver to another line running in continuation, and that to another, and so on, as the case may be, the rule is different. If there is a failure to deliver the goods at the point of destination, that, without more, casts the onus on neither railroad to account for the loss. To recover against the road receiving the freight with such conditions, the plaintiff must go further, and prove a failure of such receiving road to deliver to the next succeeding road; and if the suit be against either of the other railroads, the plaintiff must prove both a receipt of the freight, and a failure to deliver it, either to the next succeeding line, or at the point of destination, as the case may be. Less than this does not make a *prima facie* case against either railroad company. *Hutch. on Carriers*, §§ 106, 108, 759. In *Midland Ry. Co. v. Bromley*, 33 Eng. Law & Eq. 235, the suit was against the receiving railway company, whose duty, under the contract, was to deliver the portmanteau, the subject of the suit, to another connecting railway company, the latter company to deliver it at the point of destination. The portmanteau was lost, and did not reach the point of destination. The cause was heard in the court of Common Pleas, and the judges delivered their opinions *seriatim*. Jervis, C. J., said: "If it [the portmanteau] was stolen, or lost, by the Midland Ry. Co., then the defendant's contract was not performed; but, if it was stolen or lost by the Bristol & Exeter Ry. Co., then it was performed. The evidence produced at the trial is consistent with each of these suppositions. It is as consistent with the evidence that the portmanteau was lost or stolen by the one company, as by the other; and therefore I

think there was nothing to go to the jury." Creswell, J., said: "The plaintiff has not given any evidence of negligence on the part of defendant's servants." Williams, J., said: "It lay on the plaintiff to have given some proof of a non-delivery to the Bristol & Exeter Ry. Co." The language of Crowder, J., was: "The onus was on the plaintiff to show that there had not been a delivery of the portmanteau." See, also, *Gilbart v. Dale*, 5 Adolph. & Ell. 543; *Griffiths v. Lee*, 1 Car. & P. 110; *Anchor Line v. Dater*, 68 Ill. 369; *Chic. & N. W. R. R. v. Northern Line Packet Co.*, 70 Ill. 217.

In this very case, the court had charged the jury, "that the burden of proof was on the plaintiff, to show that he delivered the corn to the defendant, which he claims damages for in his suit, and that such corn was not delivered by defendant to the consignee, at the point of destination." This charge recognizes the doctrine, that the onus is on the plaintiff to prove non-delivery to the consignee. Charges to the jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof. Thus construing the charge first above copied, we hold the Circuit Court erred in holding, by necessary implication, that the burden was on the defendant, to prove that the corn—the entire three hundred bushels received—were in the car when it was delivered by being left on the side-track at Smith's mill. As to this question, under the contract and facts shown in this case, it was the duty of the plaintiff, and the burden was his, to satisfy the jury, that the loss or abstraction had occurred while the car was in the control of the railroad employees; in other words, that the road had not delivered all the corn it received from the shipper. By delivery, we mean, placing the car containing the corn on the side-track agreed on.

It may be supposed the rule here declared operates very hardly on the consignee, because it requires him to make proof which is negative in its nature. The opposite rule would apparently operate with equal oppression on the railroad. These reflections may suggest the impolicy of making contracts which are so liable to lead to misunderstandings, and to litigation. They can not justify the overthrow or disregard of great legal principles, which are sanctioned and fortified by such distinguished names. The question of delivery vel non, or when the loss, if there was a loss, did occur, was and is one for the jury to determine. They must form their opinion and verdict from the facts and circumstances in evidence. In this, they but perform a service often cast upon them, of determining disputed controversies on testimony that is not, or may not be positive, or convincing beyond reasonable doubt. Satisfactory conviction is the measure of proof required in civil causes.

We are aware that, in the rulings above, acute criticism may

discover a seeming discrepancy between our ruling when this case was formerly before us, and the present opinion. See opinion in this case on former appeal, 66 Ala. 167. The principle there stated is strictly applicable to a case where freight is delivered, but is found in a broken or damaged condition. In such case, the onus is evidently on the carrier to exculpate itself from all blame in the matter of the break or damage. But in this case the question rests on different principles. The question is the non-delivery of the corn—not the condition in which it was delivered. On this question, as we have shown above, the onus is on the plaintiff primarily to make some proof of the non-delivery. This question, as we have shown, being a subordinate one, and of easy proof when the freight is delivered at a depot, becomes very material when the freight is delivered at a private siding, as in this case.

Reversed and remanded.

Termination of Liability as Carrier.—The extraordinary liability of a railroad company as a common carrier extends until the consignee has had a reasonable time according to the custom of business to inspect and remove the goods. *Pinney v. First Div. St. Paul & Pac. R. Co.*, 19 Minn. 251; *Leavenworth, L. & G. R. R. Co. v. Moris*, 16 Kans. 333; *Winslow v. Vermont, etc., R. R. Co.*, 42 Vt. 700; *Shenk v. Phila. Steam Propeller Co.*, 60 Pa. St. 109; *Chicago, etc., R. Co. v. Bensley*, 69 Ill. 630; *Lamb v. Camden & Amboy R. R. Co.*, 2 Daly (N. Y.) 454; *Spears v. Spartenberg Union, etc., R. R. Co.*, 11 S. C. 158; *Thompson v. Boston & Providence R. R. Co.*, 10 Metc. 472; *Alabama & Tenn. R. R. Co. v. Kidd*, 35 Ala. (N. S.) 209; *Union Express Co. v. Onleman*, 92 Pa. St. 323; *Burlington & M. R. R. Co.*, and note, *infra*, with cases cited.

Liability as Warehouseman.—If the consignee fails to do his duty as to the removal of the goods, the carrier may store them and is thereafter liable as a warehouseman only. *McCarty v. New York & Erie R. Co.*, 30 Pa. St. 247; *Mohr v. Chicago, etc., R. Co.*, 40 Iowa, 579; *Stowe v. New York, etc., R. R.*, 113 Mass. 521; *Dimmick v. Milwaukee & St. Paul R. Co.*, 18 Wisc. 471; *Nicholas v. N. Y. Central R. R. Co.*, 9 Am. & Eng. R. R. Cas. 103; *McKinney v. Jewett*, 9 Am. & Eng. R. R. Cas. 249.

BURLINGTON AND M. R. R. Co.

v.

ARMS.

(*Advances Case, Nebraska. November 13, 1883.*)

Certain household goods were carried by a railway to H., in this State, reaching that point on November 14, 1879, and were placed in the company's depot. Soon afterwards the owner called for the goods, but was informed by the agent that they had not arrived. Certain friends of the owner, at his request, also, on the nineteenth, twentieth, and about the twenty-second of that month, made a similar inquiry of the agent, and were inform-

ed that the goods had not been received. The depot was burned November 24, 1879, and the goods destroyed. The custom of the railway company was to give notice through the mail, to all persons who are not regular shippers, of the arrival of their goods; but no such notice was sent to the consignee in this case: *Held*, that the railroad company was liable for the value of the goods.

ERROR from Adams County.

T. M. Marquett and A. M. Post for plaintiff.

Tanner & Capp for defendant

MAXWELL, J.—The defendant in error brought an action in the district court of Adams county to recover the value of certain household goods shipped by him from Allerton, Iowa, to Hastings, in this State, which were destroyed by fire in the depot at the latter place on the night of November 24, 1879. The railroad company, in its answer, states that the goods arrived at Hastings on the 15th of November, 1879, and that Arms was immediately notified by letter, through the post-office at Hastings, of such arrival; and that on the 18th of the month the goods were placed in the warehouse at said station, and held by said company as warehousemen. On the trial of the cause in the court below a verdict for \$160 was returned, upon which judgment was rendered. The errors assigned in this court relate to the giving and refusing instructions, which will be considered in their order.

It appears from the testimony that the goods in question arrived at Hastings on the night of November 14, 1879; that Arms had just removed to this State, and resided about thirty miles from Hastings; that some time after the arrival of the goods, but before their destruction, Arms called at the Burlington & Missouri depot in Hastings and inquired for the goods, stating that they needed them very much, and was informed by the agent that no such goods were there; that he then requested the agent to take his address and notify him through the mail of the arrival of the goods; that Arms requested one S. E. Morse, a resident of Hastings, "to watch the depot" at that place, and, as soon as the goods arrived, take them out to him. Morse called at the depot on the 19th of that month, and on inquiring for the goods was informed that they were not there. He inquired again in two or three days thereafter, and received the same answer. One Miller also, at the request of Arms, called at the depot in Hastings between 7 and 9 o'clock in the evening of the 19th of November, 1879, and inquired for the goods in question, and was informed that they had not been received. He called again on the 20th and inquired again for the goods, and was told that they were not there. This testimony is not denied, even by inference, the agent saying that he does not remember. It also appears, from the company's own testimony, that its custom was to notify all persons who were not

regular shippers, by mail, of the arrival of goods, but fails to show that notice was sent in this case.

The railroad asked the court to give the following instruction, which was refused: "The party who ships goods is bound to take notice of the time, by the usual mode and route of the shipping the same, when they would arrive at the place of destination, and it is the duty of the shipper to apply for his goods within a reasonable time after their arrival and take the same away. Therefore, if the jury find from the evidence that said goods were shipped from Allerton, in Iowa, and that, by the ordinary mode of shipping, they would have arrived on or about the 14th of November, 1879; and you further find that they did arrive on the 14th day of November, 1879, and were then stored in defendant's store or warehouse, and that plaintiff failed to apply for and get his goods and chattels until after they were burned on the 24th of November,—you will find that the defendant is not to blame for not delivering up said goods to plaintiff; and the mere fact that he sent one Miller and one Morse to inquire whether the goods were there or not, will make no difference, unless he had authorized one or both to pay the charges on the same and receive the goods in question." The refusal to give this instruction is now assigned for error. It is sufficient to say that the instruction asked is not applicable to the testimony. The plaintiff below required the goods, as he states in his testimony, "very badly," being necessary household goods, and, by himself or agents, made inquiries almost daily between the time of their arrival at Hastings and their destruction by fire, and received the invariable answer by those in charge of the depot that the goods were not there. There was therefore no question as to the failure of Arms to apply for the goods to submit to the jury. And even if Morse and Miller did not have the money or propose to pay the charges on the goods, of which there is no testimony, and take them away, still it was the duty of the agent to state to them, in answer to their inquiries, the facts in regard to the goods being then at the depot. There is no error, therefore, in the refusal to give the instruction.

The court also refused to give the fourth instruction asked for by the railroad company, which is as follows: "The following is a part of the contract introduced in evidence by the plaintiff in this case, to wit: All articles of freight arriving at their destination must be taken away in twenty-four hours after being unloaded from the cars, the company reserving the right of placing the same in store at the risk and expense of the owner, if they see fit, after the lapse of that time. If the jury find from the evidence that the goods did arrive at the place of destination on or about the 14th of November, 1879, or even as late as the 20th of said month; and if you further find that they were not taken away by the plaintiff, or some one for him, within twenty-four hours after being so unloaded,—then

you will find that they were, according to said contract, held at the risk of the plaintiff, and if they were destroyed the loss would be the loss of the plaintiff, and not the loss of the defendant, and the defendant would not be liable." It was proposed by this instruction to submit to the jury a number of questions having no pertinency to the question at issue. The testimony shows that the custom of the agents of the plaintiff in error, at Hastings, was to notify through the mail all persons who were not regular shippers of the arrival of their goods. The proof fails to show that any such notice was sent to Arms, and he was unable, by persistent inquiry by himself and agents, to ascertain that the goods had arrived. Such being the condition of the testimony, it would seem like a burlesque to instruct the jury in effect that he must lose the goods because he failed to take them away,—goods which had been received ten days before their destruction, and were in the custody of the agents, but which they persistently denied the receipt of. The liability of the railroad continued until the notice had been given and a reasonable time had intervened to permit of their removal. There was no error, therefore, in refusing to give the instruction. No particular objection has been pointed out to the instructions given by the court on its own motion, and they seem to have been quite favorable to the plaintiff in error.

The verdict is fully supported by the evidence, and is right, and the judgment is affirmed.

Notice of Arrival of Goods.—According to some authorities the carrier is bound to notify the consignee of the arrival of goods when he is not on hand to receive them. *Sherman v. Hudson River R. R. Co.*, 64 N. Y. 254; *Spears v. Spartanburg Union, etc., R. R. Co.*, 11 S. C. 158; *Union Express Co. v. Ohleman*, 92 Pa. St. 323. But see *South. & North. Ala. R. R. Co. v. Wood*, 9 Am. & Eng. R. R. Cas. 419.

Failure of Consignee to Receive and Take Away Goods.—Where a consignee has been notified of the arrival of the goods, or is held bound in law to take notice of that fact, and fails, notwithstanding, to receive the goods and take them away within a reasonable time, the carrier may store them and thenceforth may make the charges and assumes the responsibilities of a warehouseman only. *Mohr v. Chicago, etc., R. R. Co.*, 40 Iowa, 579; *Rothschild v. Michigan, etc., R. R. Co.*, 69 Ill. 164; *Stowe v. New York, etc., R. R. Co.*, 113 Mass. 521; *Hilliard v. Wilmington & W. R. R. Co.* 6 Jones L. 348; *Smith v. Nashua & L. R. R. Co.*, 27 N. H. 86; *Illinois Central R. R. Co. v. Alexander*, 20 Ill. 23; *Dimmick v. Milwaukee & St. Paul R. R. Co.*, 18 Wisc. 471; *McCarty v. New York & Erie R. R. Co.*, 30 Pa. St. 247; *Rice v. Boston & Worcester R. R. Co.*, 98 Mass. 212; *Cincinnati & Chicago R. R. Co. v. McCool*, 26 Ind. 141; *Northrop v. Syracuse & C. R. R. Co.*, 5 Abb. Pr. (N. S.) 425; *Jackson v. Sacramento & R. R. Co.*, 23 Cal. 269; *Judson v. Western R. R. Co.*, 4 Allen, 520; *Davis v. Michigan S., etc., R. R. Co.*, 20 Ill. 412; *Mobile, etc., R. R. Co. v. Prewitt*, 46 Ala. (N. S.) 68; *Ayres v. Morris & Essex R. R. Co.*, 5 Dutch. 393; *Norway Plains Co. v. Boston & Me. R. R. Co.*, 1 Gray, 268; *Alabama & Tenn. R. R. Co. v. Kidd*, 35 Ala. (N. S.) 209; *Winslow v. Vermont, etc., R. R. Co.*, 42 Vt. 700; *Chicago, etc., R. R. Co. v. Bensley*, 69 Ill. 630; *Leavenworth, etc., R. R. Co. v. Morris*, 16 Kans. 333; *Pinney v. First Div. St. Paul & Pac. R. R. Co.*, 19 Minn. 261; *Nicholas v. N. Y. Central R.*

R. Co., 9 Am. & Eng. R. R. Cas. 108; McKinney v. Jewett, 9 Am. & Eng. R. R. Cas. 209; Butler v. East Tennessee, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 249; S. & N. Ala. R. R. Co. v. Wood, 9 Am. & Eng. R. R. Cas. 419; s. c., *infra*. Unless, indeed, they are not delivered, as in the principal case, through the fault of the carrier. *Faulkner v. Hart*, 82 N. Y. 418.

NATHAN BROTHERS

v.

SHIVERS.

(71 *Alabama Reports*, 117.)

An agent of a common carrier is not only held to good faith in making a sale under the statute, of packages held for freight, but also to reasonable diligence in ascertaining and giving notice of the contents of the packages.

Reasonable diligence in such cases requires that the agent must examine all external indicia and marks on or about the packages, and all other sources of information reasonably within his reach; but he is neither required nor authorized to break or open the packages for the purpose of ascertaining their contents.

If the agent knows the contents of the packages, or has good reason for believing what they are, and, withholding such knowledge or well-founded belief, he makes the sale to a favorite having superior knowledge, and at a nominal price, this constitutes a fraud which subjects the perpetrators to an action for damages at the suit of the party injured.

Whether the agent knew, or could have learned, or had just grounds for believing what were the contents of the packages, and whether he acted in good faith in giving the notice prescribed by statute, and in making the sale, are questions for the jury under appropriate instructions from the court.

APPEAL from Hale Circuit Court.

Tried before Hon. George H. Craig.

This was an action of trover brought by Nathan Bros. against J. M. Shivers and A. M. Fowlkes, to recover damages for the alleged conversion of two barrels containing seventy nine 17-100 gallons of whiskey; was commenced on 30th July, 1879, and was tried on the plea of the general issue, with leave to give in evidence any special matter of defence, the trial resulting in a verdict and judgment for the plaintiffs.

As shown by the bill of exceptions, Nathan Bros. shipped from Philadelphia, Pennsylvania, on the 30th March, 1878, the two barrels of whiskey in controversy, consigned to A. Stollenwerck, at Greensboro, Alabama. At that time the Selma, Marion & Memphis R. R., a connecting line, running from Marion Junction, in this State, to Greensboro, was in the possession of the defendant Fowlkes as receiver, by the appointment of the Chancery Court of Perry County, and was by him, as such receiver, operated as a com-

mon carrier under the orders and direction of said court. On 6th April, 1878, the whiskey was received at Marion Junction and transported over said railroad to Greensboro. On 8th April, 1878, the consignee was notified of its arrival, and of the charges thereon; but he refused to receive it, or to pay the charges, on the ground he had never ordered it consigned to him. The two barrels were described in the "through freight list or bill of lading" as "2 Bbls. Wet." No demand having been made for these barrels, and the freight not having been paid thereon, Shivers, acting under the direction of Fowlkes, on the 4th of December, 1878, advertised them, with other articles held for charges, for sale for the payment of the charges thereon, in a newspaper published at Greensboro; and on the 3d January, 1879, the day appointed for the sale, they were sold by Shivers at the depot at Greensboro at public outcry, and were bid in by him for Fowlkes at \$12.50, the amount of the charges and expenses of sale. In the advertisement of the sale the barrels were described as "two barrels, wet, consigned to A. Stollenwerck." On 11th January, 1879, the two barrels were shipped to Marion, Alabama, for Fowlkes, and on the same day were sold by him to a party at Marion, as containing fifty-seven gallons of whiskey, at \$2.00 per gallon. The whiskey was shown to have been worth at Greensboro \$8 per gallon.

The plaintiff also introduced evidence tending to show that both defendants knew or had information of the contents of the barrels prior to the sale. Both Shivers and Fowlkes were examined as witnesses on their own behalf, and they testified that they had no knowledge of the contents of the barrels until after the sale, Fowlkes further testifying that "his information in respect thereto was confined to that afforded by the through freight list or bill of lading which came with the said property." The defendant Shivers further testified that on the 4th of December, 1878, he again demanded of Stollenwerck, the consignee, the charges due on the barrels, and that Stellenwerck refused to pay said charges, or to receive the barrels, "and gave as his reasons therefor that he had never ordered them to be shipped, and that they contained stuff which had to be 'doctored' before it could be sold, and he did not wish to deal in it. Until this conversation witness had no information of the nature of the contents of said barrels, except such as was imparted by the description in the bill of lading which came with them, nor did he know that Nathan Bros. were the consignors thereof. Upon hearing that they were consignors, he immediately, on the same day, gave notice to, and made demand on them for said freight and charges by postal card mailed to them at Philadelphia." He further stated that he saw on said barrels no such brands as showed their contents to be whiskey; that whiskey barrels were very frequently used for the shipment of other liquids, such as mineral water, vinegar, and the like, and that the brands or marks

on such barrels very often do not show their real contents. It was also shown by the defendants that it was the usage and custom of common carriers, in advertising freight for sale, to describe it as it was described in the freight list or bill of lading.

Exceptions were reserved by the defendants to charges given by the circuit court, and to charges requested by them and refused by the Court. The rulings of the circuit court in its instructions to the jury are, for the purposes of this report, sufficiently stated in the opinion.

Theo. Seay for appellants. (1) The sale was fair, and in exact accordance with the terms of the statute (Code of 1876, § 2141); and the sale was not made until after the goods had been lying in the depot for over six months. (2) The description of the property in the advertisement of sale was the only description that could have been obtained without committing a conversion of plaintiff's property; and it was in exact accordance with the bill of lading, and with a well recognized and established custom. (3) If the law be as charged by the court below, a very great and unnecessary hardship rests upon common carriers; the requirement that every package shall be examined, and the responsibility incurred by an inaccurate description of the goods would very much embarrass the operation of common carriers, especially in the centres of trade.

Jas. E. Webb, contra. (1) The sale of the whiskey was illegal, because a carrier's power to sell goods for freight is purely statutory. Redfield on Carriers, § 283. For his power to sell the carrier must rely on our statutes. Code 1876, §§ 2140-1. This statute, being an inroad on the common law, must be strictly construed and strictly pursued. 30 Ala. 591; 20 Ala. 189; 20 Ala. 544; 19 Ala. 43. (2) The sale was illegal, because no advertisement describing the property was made. The advertisement of "two barrels wet" did not convey to the mind of bidders the least idea as to the character of what was to be sold. The purpose of the statute, as declared in *Western Railroad Co. v. Rembert*, 50 Ala. 25, is to authorize a carrier to be released from responsibility "without detriment to the owners or consignee." (3) Trover lies in this case. See 2 Hilliard on Torts, pp. 101 and 110; 21 Ver. 204; 44 Maine, 491; Redf. on Carriers, p. 220, § 298; *Chandler v. Belden*, 18 John, 157; *Gracie v. Palmer*, 8 Wheat, 605; 2 Wait's Act. and Def. pp. 58 and 61; *Briggs v. Boston R. R. Co.* 6 Allen, 246; 33 Me. 438; Angel on Carriers, § 431, p. 364, and authorities there cited; Redf. on Carriers, §§ 706, 710, and authorities there cited. (4) Nathan Bros. were the proper parties to bring the suit. Angel on Carriers, § 495, note 6, p. 414, note 1, p. 415, note 3 p. 415, and authorities cited; *Swan v. Sheppard*, 1 M. & R. 224; 2 Hilliard on Torts, pp. 443-4, and authorities cited.

STONE, J.—In form, the railroad, in the present case, appears to

have pursued the letter of the law, in the matter of advertising and selling the packages or barrels, for the payment of the freight charges. We say the railroad, for all this was the act of the railroad, although in fact done through its agents or employees. To the railroad corporation the freight charges were due, the freight was in the railroad's depot, and the corporation only, or its appointee or agent, could make the sale. Corporations act by their agents or officers. Code of 1876, §§ 2140 et seq.

But in making such sale, good faith and reasonable diligence must be observed. The agent or agents entrusted with the duty, must have employed reasonable diligence in ascertaining the contents of the barrels; and if they had information of what the contents were, or could have acquired such information with reasonable diligence, then it became their duty to give notice of it, so as to effect the best sale they could. This was their duty to the owners of the freight, and to the railroad corporation. If, knowing the contents of the barrels, or having good reason for believing what they were, the agent selling withheld such knowledge, or well founded belief, and the effect was that the barrels were sold to a favorite, having superior knowledge, and at a nominal price, this was a fraud which would subject the perpetrators of it to an action for the damages, at the suit of the party injured. The law will not sanction or excuse such faithlessness in an agent. *Sarjeant v. Blunt*, 16 Johns. 74; *Wright v. Spencer*, 1 Stew. 576.

The circuit court ruled, in this case, that the advertisement under which defendants effected the sale was insufficient, in that it did not describe the contents of the barrels; and that in order to give a proper description, "the defendants had the right to examine the contents of the barrels." The description given in the advertisement was "two barrels wet." The testimony was, that this was the description given of the barrels in the bill of lading which accompanied them. We feel justified in inferring that this description was intended to indicate the contents, as distinguished from dry barrels. These were wet barrels, in the classification of freight. In two respects the circuit court erred: First, in holding, as matter of law, that the advertisement was insufficient; and, second, in ruling that the defendants were authorized to examine the contents of the barrels. As we have said, reasonable diligence and good faith were exacted. Reasonable diligence implies that the agent should have examined all external indicia and marks, the odor of the barrels, if they emitted an odor, and all other sources of information, reasonably within his reach. If, from these sources, or from any information he may have received, he knew, or could have known the contents with proximate accuracy, then his conduct in advertising as he did was culpable. He should have informed the public of all he knew, or could have learned with reasonable diligence. He stood in the relation of agent, both

to the railroad corporation and to the owner of the barrels, and he owed to each of them good faith. He had no authority to open the barrels to ascertain their contents. Whether he acted with reasonable diligence in ascertaining the contents—whether he knew, could have learned, or had just grounds for believing what were the contents, and whether he acted in good faith in giving the notice and making the sale, were questions for the jury, under appropriate instructions embodying the principles above declared.

Shivers testifies he bid in the barrels for Fowlkes, at whose instance he advertised and made the sale. Being his agent or employee both to sell and buy, we need not inquire as to the separate liability of Fowlkes. The same duties and liabilities rested on the latter, as did on the mere instrument by which he effected the sale.

Reversed and remanded.

Enforcement of Carrier's Lien.—A carrier cannot independently of statute enforce his lien for freight by selling the goods. *Briggs v. Boston & Lowell R. Co.*, 6 Allen, 246; *Indianapolis R. Co. v. Herndon*, 81 Ill. 143; *Hunt v. Haskell*, 24 Me. 339; *Sullivan v. Park*, 33 Me. 438; *Locky v. McDermott*, 8 S. & R. 500. See *Gavward v. Stevens*, 3 Gray, 97.

NEW YORK AND NEW ENGLAND R. R. Co.

v.

SANDERS.

(134 *Massachusetts Reports*, 53.)

A carrier, having a lien for freight upon an entire cargo of coal, delivered a portion of it, on the order of the consignee, to a person who had purchased the whole cargo from the consignee. Subsequently, the carrier, on the arrival of the remainder of the coal, notified the purchaser that he claimed a lien on the remainder for the freight of the entire cargo, and ordered him not to disturb or unload it. The purchaser, without right, appropriated the remainder of the coal to his own use. *Held*, that the fact of such taking did not, of itself, as matter of law, import a promise on the part of the purchaser to pay to the carrier the freight of the entire cargo.

F. P. Goulding for the plaintiff.

A. J. Bartholomew & F. T. Blackmer for the defendant.

MORTON, C. J.—The material facts in this case are as follows: The firm of William Edwards's Sons bought a cargo of coal in New Jersey, which was shipped by water to Norwich, consigned to the order of the seller. At Norwich the plaintiff received it and paid the freight, and billed the coal to said Edwards's Sons at Sandersdale. Before any of the coal arrived at Sandersdale, Edwards's

Sons sold it to the defendants, and directed the plaintiff to deliver it to them. The plaintiff accordingly delivered to the defendants, as it arrived, all of the coal except nine car loads, without any demand for the freight. Before the nine car loads arrived at Sandersdale, Edwards's Sons failed, and the plaintiff then notified in writing the defendants "not to disturb or unload from the cars any part of the coal consigned to William Edwards's Sons, as the freight and charges on the same are unpaid."

Afterwards, on the same day, said nine cars of coal arrived, and the plaintiff placed them on the side track running by the defendants' coal sheds, where it had been the custom to leave cars containing coal for the defendants, and the defendants, without any authority from the plaintiff, unloaded the coal into their sheds and used it. The plaintiff did not contend, before the defendants took the nine car loads of coal, that the defendants were personally liable for the freight upon it, and the defendants did not understand or believe that the plaintiff looked to them for said freight; but they were notified and understood that the plaintiff claimed a lien upon the undelivered coal for the whole freight and the advances upon the whole cargo, and did not intend to deliver it unless such freight and advances were paid.

The declaration has three counts. The first two may be treated as one, being the same in substance. They are counts in contract, alleging a promise of the defendants to pay the freight and charges upon the whole cargo. The third is a count in tort for the conversion of the nine car loads.

At the trial, it was admitted that the plaintiff was entitled to recover on the third count; and the only question was whether, on the foregoing facts, it could recover on the counts in contract. The plaintiff asked the court to rule that, "if the defendants, being the owners of said coal subject to the lien, took the coal, having notice that the plaintiff claimed a lien on it for the whole freight and advances, and did not intend to deliver it to the defendants unless they paid such freight and advances, a promise to pay such freight and charges would be implied, and the plaintiff is entitled to recover on his counts in contract." The court refused this ruling, and, the case being tried without a jury, found for the plaintiff on the count in tort for the value of the nine car loads.

The only question before us is whether the superior court was justified in refusing this ruling. In other words, the question is whether the defendants, if they knew that the plaintiff claimed a lien upon the coal for the whole freight, and did not intend to deliver it to the defendants unless they paid such freight, are conclusively presumed, as matter of law, to have promised to pay such freight from the mere fact of taking the coal. It is not contended that there was any express promise to support the counts in contract. The plaintiff contracted with and looked

was, by said Small, at the time it was received for storage, mixed with other grain of same grade and quality, and placed in a bin in the elevator; such mixing being done as each load was delivered by the various parties hauling the same.

“(3½) That at the time of storing the wheat with said W. E. Small no agreement was made as to whether the grain should be mixed with other grain or kept separate, and plaintiff had no knowledge as to whether the grain was kept separate or mixed.

“(4) That after the burning of this wheat the plaintiff brought a suit against the said Small to recover for the value of the wheat, such suit being brought in the district court of Poweshiek county, Iowa; and such proceedings were had in said cause that, upon a trial had, a judgment upon the merits was rendered against the plaintiff for costs. A copy of the petition, answer, and all the pleadings in said cause, is hereto attached, marked Exhibit A, and made a part hereof.

“(5) That this cause, when tried and decided, was never appealed, and the judgment entered therein was a final one.”

The above are agreed to be the facts in this case, for the purpose of this trial.

The pleadings in the action brought by the plaintiff against Small to recover the value of the wheat, show that the plaintiff claimed to recover of Small upon the ground that he had made an actual sale of the property to him. He did not seek to recover upon a contract for storage or bailment. Small denied that there was any contract of sale, and claimed that the wheat was merely stored with him, and that he held it as a bailee for the plaintiff.

It is not claimed in argument that the defendant was not in fault in communicating the fire to the elevator. In the case of *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 582, which was an action to recover damages for the destruction of property by the same fire, the defendant was held to be liable. In this action the question of original liability is not involved. But the defendant claims that because Small, without the knowledge of the plaintiff, mixed plaintiff's wheat with other grain of the same grade and quality, that the act of Small in this mixing of the grain was a conversion of plaintiff's grain, and that Small was liable to the plaintiff for the value thereof by reason of the conversion. In the case of *Sexton v. Graham*, 53 Iowa, 181, it was held that where a warehouseman, with the consent of the owner of grain of the same grade and quality, mixed the same in one common mass, the owners became tenants in common of the entire amount in store of like quality; and a majority of the court held that this tenancy in common continues, although the entire mass in store may be changed by continued additions and subtractions.

There is no controversy in this case as to a change of the identity

of the grain, for it is conceded that the wheat which the plaintiff stored was destroyed by the fire. It appears from the agreed statement of facts that Small did not mix the plaintiff's wheat with his own. The elevator was being operated by Small for storing and shipping grain, and as each load of wheat was delivered by various parties hauling the same it was placed in the same bin in the elevator. This mingling of the same grade and quality of grain did not divest any of the owners of their property therein. Each was a tenant in common of the entire mass, and was entitled to have his share when demanded. While it is true, as claimed by appellant, that the court cannot take judicial notice of a custom to so mix and mingle such property by warehousemen, yet a court cannot ignore the fact that the grain elevators in this State cannot be operated in any other manner. If a proprietor of an elevator should be required to store each farmer's grain in a separate bin, and for failure to do so should be held liable for a loss of the grain by fire, the business of stowing grain in elevators would practically cease. It would require as many bins as there are depositors. Nor do we think the fact that the grain was mixed with other grain without the knowledge of the plaintiff can in any manner affect his rights. Suppose the creditors of Small had attached the grain while in the bin. There can be no doubt that the plaintiff could have maintained replevin and recovered the grain belonging to him from the common mass. The mere fact of an admixture of goods of the same grade and quality, does not divest the owner of his property, whether the act be done with or without his knowledge. *Steams v. Raymond*, 26 Wisc. 74.

In 2 Pars. Cont. 136, it is said: "There may be a confusion of goods made honestly, when the goods of a party are mingled with the goods of another party of the same kind, description and value; as if A receives 10 bushels of corn from B, and, with no wrongful purposes mingles them with corn of his own of the same kind. Here there is a confusion of goods which, in one sense, is perfect; for it would be impossible to identify a single grain as belonging to either party. But for all practical purposes the grain of one party may be as certainly and accurately separated from the grain of the other party by measuring out 10 bushels, as the horse of one might be separated from the other by leading him out of the stable. So, in this case, if the plaintiff at any time before the fire had demanded his grain from Small, it could have been separated from the common mass and delivered to him, and he would have had no right to object to receiving it because it had been, without his knowledge, mixed with other wheat of like quality. There was, therefore, no wrongful conversion of the grain by Small. This case is unlike the case of *Johnston v. Browne*, 37 Iowa, 200, and other cases in this court. In this case there was no sale of the grain by Small, and no agreement nor understanding that he should

sell it and return grain of like grade and quality. The agreed facts in this case show that Small received the grain as a bailee, and that it was actually destroyed by fire.

2. It is claimed that as the plaintiff elected to hold Small responsible for the loss of his grain by commencing an action against him, he cannot recover of the defendant. If by the agreed statement of facts it was shown that Small was liable to the plaintiff there might be merit in the argument. But this question we need not determine, because we do not think Small was liable to the plaintiff. His liability was that of a warehouseman only, and in our opinion the mixture of the grain was not a wrongful conversion.

3. The court gave judgment for the plaintiff for the value of the wheat, with interest at 6 per cent per annum from May 26, 1876. The defendant, in a motion for a new trial, claimed that the court erred in allowing interest, and in computing the interest, and that the judgment included too much interest. The motion was overruled, and this ruling of the court is assigned as error. This is an action to recover the value of property destroyed by the negligence of the defendant. The amount of damages is capable of exact computation. The amount for which the defendant is liable is the value of the wheat. It is true, it is not what is called liquidated damages. But, notwithstanding it is unliquidated, we think the court did not err in allowing interest.

Indeed, we can see no difference between this case and the case of *Mote v. Chicago & N. W. R. R.*, 27 Iowa, 22. That was a case where, by reason of the negligence of the defendant, the plaintiff's baggage was stolen from the warehouse of the defendant, and it was held that interest on the value of the stolen property was properly allowed. See, also, *Sedg. Dam.* 476, and 3 *Pars. Cont.* 104. It is conceded, however, that the interest assessed was \$33.43 in excess of the actual amount due, and the plaintiff now offers to remit the same. The amount of the judgment will be reduced to that extent, and as the question of an excess of interest was made and presented to the court below in the motion for a new trial, and the same was overruled, the plaintiff will pay the cost of this appeal.

Modified and affirmed.

Admixture of Goods.—Where the goods of one person are mixed indiscriminately with those of another so that separation is impossible, the respective owners are to be considered as tenants in common of the whole mass. *Sexton v. Graham*, 53 Iowa, 181; *Cushing v. Breed*, 14 Allen, 376; *Bryant v. Clifford*, 13 Metc. 138; *Keller v. Godwin*, 111 Mass. 490; *Wingate v. Smith*, 20 Me. 287; *Pratt v. Bryant*, 20 Vt. 333; *Forbes v. Fitchburg R. Co.*, 9 Am. & Eng. R. R. Cas. 80.

But see *Ryder v. Hathaway*, 21 Pick. 298; *Stephenson v. Little*, 10 Mich. 433.

LEADER

v.

NORTHERN R. R. Co. et al.

(8 Ontario Reports, C. P. Div. 92.)

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D, a brewer in Toronto, and shipped same by the defendants' railway, consigned to D at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated that such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out below. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiff's, which D refused to accept.

Held, that the consignment note and shipping receipt, which constituted the contract between the parties, showed that a distinction was made between grain consigned to the defendants' elevator and other grain; the conditions as to warehousing, set out below, being only applicable to the former, and that the plaintiff was therefore entitled to recover the damages sustained by the non-delivery of the specific grain shipped.

STATEMENT OF CLAIM.

1. The plaintiff, who is a farmer residing in the township of Saint Vincent, in the county of Grey, agreed with one Robert Davies to sell him a car load of barley, according to a sample of barley with which he supplied Davies.

2. In order to carry out his agreement for the sale of the barley, the plaintiff, on the 20th day of November, 1882, delivered at Meaford to the defendants, who are carriers of goods for hire, one car load of barley, in car number 2252 of the defendants, containing about 550 bushels, consigned to said Robert Davies, to be by them safely and carefully carried for hire for the plaintiff from Meaford to Brock street freight shed, Toronto, and there delivered to the said Davies.

3. The defendants then received the barley on the terms and for the purposes aforesaid.

4. A reasonable time for the carriage and delivery to the plaintiff's consignee, Robert Davies, has elapsed.

5. The defendants have not delivered the car load of barley, or any part of the same, to the plaintiff's consignee, Robert Davies, or to the plaintiff, at Brock street shed, or at all.

6. The plaintiff has, by reason of the premises, been deprived of and lost the car load of barley, and the profits he would have realized from the sale thereof to the said Davies.

7. Trover.

STATEMENT OF DEFENCE.

1. The defendants received from the plaintiff, at their station in Meaford, on the 20th November, 1882, 500 bushels of barley, under a special contract in writing in the following terms, viz. (setting out the grain consignment note and the third condition on the back thereof, set out below).

2. Upon the arrival of the barley at the Brock street station, the consignee, R. Davies, was notified thereof and paid the charges thereon, and the defendants deposited the same, under the terms of the third condition of their contract, in one of their elevator bins.

3. The barley, before being so deposited, was inspected by the government grain inspector and classified as No. 3 in his certificate, and upon said certificate the barley was placed in the proper bin for that grade of grain.

4. The defendants have duly performed their part of the said contract, and have always been and are ready and willing to deliver to the consignee the barley, according to the terms of the contract.

5. The defendants submit that the plaintiff has no property in the barley, but that the same has passed to the consignee, and that the plaintiff has no right of action against the defendants in respect of the same.

REPLICATION.

1. Issue.

2. The plaintiff further says, that the grain was not consigned to the defendants' elevator at Toronto, but, on the contrary, to Brock street freight shed station, as will fully appear on reference to the defendants' shipping receipt (setting out the same in full, as also the conditions on the back thereof, set out below).

The cause was tried before Galt, J., and a jury, at Owen Sound, at the Spring Assizes of 1883.

The facts appeared to be that the plaintiff had agreed with one Davies, a brewer, residing in Toronto, for the sale to him of a quantity of barley by sample, at 65 cents per bushel. The plaintiff was to pay the freight and cartage, and Davies was to get the barley at one of the local switches on George street.

The plaintiff signed a "grain consignment note," in the following terms:

"Meaford Station, Nov. 20, 1882.

"The Northern and North-Western Railway Companies will please receive the undermentioned property, loaded in bulk in car No. 2252, addressed to Robert Davies, Brock street station, Toronto, to be sent to ———, subject to their tariff, and under the conditions and contract stated on the other side."

The following "grain shipping receipt," was at the same time given to the plaintiff, by the defendants' agent, in Meaford:

“Received in bulk, loaded in car No. 2252, on and subject to the conditions mentioned on the other side (and which are on the back or the company's request to ship) from D. Leader, 500 bushels of barley, and to weigh 24,000 lbs., consigned to Robert Davies, Brock street freight sheds, Toronto. The companies will not under any circumstances recognize this as transferable, but as to grain consigned to the companies' elevator at Toronto they will grant a negotiable receipt from the said elevator when the grain shall have been received and weighed there, and the companies' freight and charges have first been paid thereon.”

The material conditions referred to in these documents are the following:

“1. The companies will not receive in bulk for transmission to their elevator at Toronto, or elsewhere, wheat or other grain being unsound or badly cleaned.

“2. No less quantity of grain in bulk than one car load will be forwarded to the elevator on the Northern and North-Western Railways.

“All grain will be inspected and classified by the government grain inspector in accordance with the rules of the Toronto Corn Exchange, and will be deposited in common with other grain of the same grade in the elevator bins at the discretion of the companies' agent.”

A witness who had examined the barley on the car at Meaford said that it was really a little better than ordinary 3 grade barley, but that being slightly discolored caused its grade to be lowered.

The plaintiff said that after making the sale to Davies he went to the freight office of the Northern Ry. Co. in Toronto, and they agreed with him there that the barley should be sent to George street: that on his return, on going to make the shipment he asked Mr. Stirling, the companies' agent at Meaford, if he would receipt the car to George street: that he distinctly gave Stirling to understand that the barley was not to go to the elevator, explaining to him that it had been sold by sample.

This evidence was received subject to the objection that it was not admissible for the purpose of varying the written contract between the parties, and it did not appear that the plaintiff was not, in fact, aware of the terms and contents of the shipping receipt and consignment note.

The barley arrived in Toronto on the 21st November, and a freight advice note was sent to the consignee, that car No. 2252 consigned by D. Leader, of Meaford, containing 500 bushels of barley, had arrived at the station to his address and remained at owner's risk; and further, that if goods were not removed from the cars within twenty-four hours after arrival a charge for demurrage would be made at the rate of one dollar per car per day.

On the same day the barley was inspected by the government

grain inspector as No. 3 grade, and deposited in the companies' elevator in bin No. 6 containing No. 3 barley. This was done without notice to the plaintiff or to Davies, who, on subsequently informing the defendants through the telephone that he was anxious to get the barley, was told by them that there was a jam in the yard with cars just then, and that it might not be down for a day or two.

On the 29th November, the defendants sent a post card that car 2252 was at George street, and requested him to unload that day. On sending down teams for the purpose the man in charge of the car would not allow it to be unloaded, because the car instead of being 2252 as advised was 2232. On telephoning to the defendants again they advised that it was a mistake, and that the correct car would follow. On the 5th December another post card was sent stating that car 2045 was at George street, and Davies seeing it was not the No. of the car he had bought from the plaintiff compared the contents with the sample and rejected it, because the barley contained in it was not equal to sample.

It appears that the barley in car No. 2045 had been taken from bin No. 6 of the company's elevator, and was the same quantity as had been transferred to that bin from car 2252, and the government grain inspector deposed that both were of No. 3 grade.

The jury were asked whether the agreement was that the barley was not to go to the elevator, but was to be taken to the George street switch.

They found that the defendants agreed to deliver the barley at the latter place, and assessed the damages at \$359, for which sum the learned judge directed judgment to be entered for the plaintiff.

At the Easter sittings of the Divisional Court G. D'Arcy Boulton, Q. C., obtained an order nisi to set aside the judgment entered for the plaintiff, and for a new trial, or to enter a verdict for the defendants.

During the same sittings, June 5, 1883, G. D'Arcy Boulton, Q. C., supported the order. The contract as set out in the statement of claim is a contract to deliver at the Brock street station, and is in accordance with the written contract. At the trial evidence was admitted of a totally distinct contract, namely, a contract to deliver at the George street switch. This was clearly inadmissible, as being an admission of parol evidence to vary the written contract. At all events the parol evidence does not disclose a contract with the defendants. The plaintiff says that he had a conversation with some clerks in the office. He does not show that they had any authority to bind the defendants. Under the conditions the defendants were entitled to warehouse the barley, and therefore the contract was complied with when they offered the plaintiff grain from the warehouse of the same grade as

the plaintiff delivered to them for carriage. *Fitzgerald v. Grand Trunk Ry. Co.*, 28 C. P. 587, 4 App. 601, 5 Sup. Ct. R. 204; *Watkins v. Rymill*, 10 Q. B. D. 178, 187.

Creasor, Q. C., contra. The circumstances under which the barley in question was delivered to the defendants disposes of the objection as to admission of parol evidence. The plaintiff sold the barley to Davies by sample at five cents above the market price, but only if he could arrange with the defendants to have it delivered at the George street switch. The plaintiff then went to the defendants' head office and explained to them the sale he had made, and it was arranged that the grain should be delivered at the switch; but as defendants' agent at Meaford could only give a shipping receipt for the Brock street station, the receipt was so drawn up, but plaintiff was informed that the grain would be forwarded to the switch. The plaintiff expressly told defendants that the grain was not to go into the elevator. The parol evidence did not vary the written contract, but showed that it did not contain the whole contract. The written contract was for the carriage to Brock street station, and the parol evidence shows that there was a further contract to carry to the George street switch, and the conditions as to warehousing only apply to grain which is consigned to the elevator. *Malpas v. London and South-Western Ry. Co.*, L. R. 1 C. P. 435. The plaintiff therefore was entitled to receive the specific grain delivered to the defendants. Assuming therefore that the contract would be complied with by a delivery at the Brock street station there never was any delivery there, or any delivery at all of the specific grain.

OSLER, J.—The breach of contract alleged in the statement of claim is not that the defendants did not deliver the barley at the George street switch, but that they did not deliver it to Davies or the plaintiff at the Brock street freight sheds, or at all.

The question is, not whether the real agreement was for a delivery at the George street switch, which the defendants were evidently willing to make, instead of at the Brock street freight sheds, but whether they had the right to deposit the plaintiff's grain in their elevator with other grain of the same grade, and then to deliver to him or his consignee any grain of that grade in satisfaction of their undertaking.

I am of opinion that the plaintiff is entitled to recover, on the short ground that the conditions on which the defendants rely are applicable only to grain which is consigned to their elevator. The consignment note and shipping receipt must be read together, and they, with the conditions endorsed, constitute the contract between the parties. Then we see by the terms of the shipping receipt that the company distinguish between grain consigned to their elevators and grain not so consigned, by undertaking as to the former

to give the shipper a negotiable receipt therefor from the elevator when it has been received and weighed there. Therefore, and because also of the right, under the third condition, to mix the grain with other grain of the same grade, it is necessary to provide, as the first condition does provide, that the company will not receive for transmission to their elevators wheat, etc., which is unsound or badly cleaned.

In terms, the third condition, which provides for the inspection of all grain by the grain inspector, would include grain carried in bags. The evidence however, is, that the company do not treat it as applying to anything but grain forwarded in bulk. So also, it would in terms include grain consigned to intermediate stations where there is no elevator, and thus authorize the company to carry it forward and deposit it wherever there might happen to be one, and have it inspected and classified by the government inspector. That, however, is evidently not the meaning of the condition.

When grain is consigned to the elevator, and there may, therefore, be difficulty in finding separate accommodation for each consignment, it is convenient that it should be classified or graded, and that all of the same grade should be deposited together. But where the grain has been already sold, and possibly, as in the present case, by sample, and is conveyed direct to the purchaser, and the shipper, therefore, needs no negotiable receipt, why should it be placed in the elevator when it has not been consigned there? It is only as to grain so consigned that, by the terms of shipping receipt, a negotiable receipt will be granted.

I think the order nisi should be discharged, with costs.

Wilson, C. J., and Galt, J., concurred.

Order discharged.

COVENTRY, SHEPPARD & Co.

v.

GREAT EASTERN RY. Co.

(*English Law Reports*, 11 Q. B. Div. 766.)

The defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiffs. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent:

Held, that the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B.

ACTION to recover the amount of certain advances made to Bowden & Co.

At the trial before Pollock, B., the following facts were proved: The plaintiffs were corn factors and corn merchants in the city of London. On the 12th of December, 1881, Bowden came to the plaintiffs and asked for an advance of money. He produced a delivery order signed by certain persons trading as Birkett, Sperling & Co., dated on that day, and addressed to the defendants, directing them to deliver to Bowden 150 sacks of wheat from Seagrave contained in certain trucks with numbers, "as per orders lodged." On the faith of that document the plaintiffs made advances to Bowden, and the delivery order was sent to, and lodged with, the defendants on the 13th of December, and they accepted it. On the 14th of December, Bowden came to the plaintiffs with another delivery order made out on a form of the defendants, and printed at the foot of the advice note. The commencement of the advice note, which was addressed to Bowden, was in the following terms: "Dated December 13th. The undermentioned grain consigned to you having arrived at this station, I will thank you for instructions as to its removal hence as soon as possible, as it remains here to your order, and is now held by the company not as common carriers but as warehousemen." The grain was described as coming from Seagrave, and as consisting of 150 sacks of wheat. The numbers of the trucks were not apparently identical with the numbers of those containing the 150 sacks above mentioned. Bowden filled up the delivery order with the plaintiffs' name, and they thereupon made further advances to him. That order was lodged with the defendants, together with a letter of the same date (13th December) addressed to them and signed by the plaintiffs, and this delivery order also was accepted by the defendants. Afterwards Bowden became insolvent. In January the plaintiffs found it necessary to realize these securities, but when they tried to sell the wheat they were informed by the defendants that there was only one parcel, and that it was a mistake on their part to accept the second delivery order. Upon taking the account between the plaintiffs and Bowden, in respect of the advances made to him, it was found that a balance of 113*l.* was due to the plaintiffs, which they sought to recover in this action.

The defendants alleged that an advice note of the 9th of December, which was only preliminary, and was marked "account to follow," was sent to Bowden as the consignee of the wheat from Seagrave; that advice note was transferred by him to Birkett, Sperling & Co., and the defendants agreed to hold to their order.

This document never came to the plaintiffs' knowledge. On the 12th of December, Birkett, Sperling & Co. instructed the defendants to deliver the goods to Bowden, as has been already mentioned. Upon the document of the 13th of December the words "charges only" were written at the top and across it, and it was intended by the defendants to be merely an account of the charges. At the foot of the document of the 13th of December, 1881, were the following words: "Notice, please sign the under mentioned order, without which the goods cannot be delivered by the Great Eastern Ry. Co. Please deliver the above mentioned goods to Coventry, Sheppard & Co., or bearer. Bowden & Co." It was endorsed "Coventry, Sheppard & Co."

Pollock, B., was of opinion that the advice note amounted to an admission by the defendants that they held the grain at the disposal of the consignees, and that the plaintiffs were entitled to say that the documents must be taken as representing goods actually in the defendants' possession. He gave judgment for the plaintiffs for 113*l.*, the case having been tried without a jury.

The defendants appealed.

Forbes, Q.C., and French for the defendants.

The alleged estoppel in the present case arises upon the supposed negligence of the defendants in improperly sending out the advice notes; but *Carr v. London & Northwestern Ry. Co.*, Law Rep. 10 C. P. 307 is in point, and shows that the defendants have not been guilty of such negligence as to estop them from stating the truth. The defendants made no representation of fact, and therefore they are not liable to an action. *Farmeloe v. Bain*, 1 C. P. D. 445. The act of the defendants was not the proximate cause of the injury sustained by the plaintiffs, and the defendants did not neglect any duty owing either to the plaintiffs or to the general public. *Arnold v. Cheque Bank*, 1 C. P. D. 578. Mere carelessness in conducting their business would be insufficient to render the defendants liable. *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1. The defence to this action may be rested upon two grounds: first, the defendants did not intend that the advice notes and delivery orders should be acted upon; these documents are not negotiable instruments; they are not like bills of lading or iron warrants: *Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 5 Ch. D. 205; secondly the defendants had no reason to suppose that any fraud would be perpetrated.

Finlay, Q. C., and Albert Gray for the plaintiffs.

By the defendants' negligence the plaintiffs were misled into advancing money to Bowden, for owing to the advice notes and delivery orders they were induced to rest satisfied and to abstain from making inquiries; and this is sufficient to render them liable. *Knights v. Wiffen*, Law Rep. 5 Q. B. 660. These advice notes are plainly documents upon which advances of money may be easily

obtained; the defendants ought to have contemplated that if they were guilty of negligence a dishonest use might be made of the advice notes.

French, in reply. The doctrine as to estoppel is never to be applied without necessity, for "estoppels are odious," per Bramwell, L.J., in *Baxendale v. Bennett*, 3 Q. B. D. 525, at page 529, and here there is no reason for holding that an estoppel has been created against the defendants.

BRETT, M.R.—This judgment must be affirmed. It can be upheld only on the ground of estoppel, that is, that the defendants were prevented by their own conduct from relying upon the fact that there were not two parcels of goods. There was one parcel which the defendants were bound to deliver to Bowden & Co. On the 13th of December they sent to Bowden & Co. a document couched in a certain form, and stating that certain goods had arrived and were subject to their orders; and there was a memorandum—"Notice, please sign the under mentioned order, without which the goods cannot be delivered." If I had had to construe that document, I might have felt doubt whether the delivery was to be made to a servant or not; but I should not have felt much doubt. Now I have the means of ascertaining what is the truth by finding out how the company have dealt with the documents. As to the document of the 9th of December, Bowden & Co. endorsed it in blank, and handed it to Birkett, Sperling & Co., who gave notice to the defendants to hold the goods for them. This notice of course was not sent to persons who were mere carriers; the railway company undertook to hold the goods for Birkett, Sperling & Co. It was intended that there should be a delivery not to a mere servant, but to some person who should buy the grain for himself. Birkett, Sperling & Co. endorsed to the plaintiffs. The conduct of the defendants showed that they undertook to deliver to those persons, to whom the document should be handed over. As to the order of the 13th of December, the defendants acted similarly; they did not treat it merely as an invoice. The plaintiffs advanced money upon the faith of the document; they took the delivery order as a security upon which they might advance money; the second document was treated as an admission that the defendants were holding other goods; the plaintiffs advanced the money because the document was presented to them. The question is as to the second document. It is an undertaking. The question is whether the facts of this case are brought within any of the recognized doctrines as to estoppel. In *Carr v. London & Northwestern Ry. Co.*, Law Rep. 10 C. P. 307, certain propositions were laid down as to estoppel: one of them, that as to negligence, will govern this case. Now, were the defendants guilty of culpable negligence? Might the plaintiffs reasonably suppose that the document,

upon which the defendants themselves had acted, had been correctly drawn up? It is true that there can be no negligence, unless there be a duty; but here the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents.

Then was the negligence of the defendants the "proximate" cause of the loss sustained by the plaintiffs? I use the expression "proximate cause" as meaning the "direct and immediate cause." Here the production of the document was the "direct and immediate" cause of the advance of money to Bowden & Co. by the plaintiffs. And certainly the negligence of the defendants was to the prejudice of the plaintiffs, and allowed the fraud to be perpetrated upon them. It seems to me, therefore, that the defendants are estopped as against the plaintiffs, their negligence having been the immediate cause of the advance. I do not think that the acceptance of the delivery order is a ground of estoppel in this case, because at that time the money was already advanced. We are here judges both of law and of fact, and I am of opinion that the money was irrecoverably lost when it had been advanced to Bowden & Co. But the acceptance of the document is fatal to the defendants as showing that they elected to treat it as a delivery order; and it is the strongest piece of evidence that they so acted as to entitle persons to believe that they would deliver the wheat when the proper document should be presented to them. The documents issued by the company are not negotiable instruments, and do not pass the property; but the defendants are estopped from denying the plaintiffs' right to the sacks of grain claimed by them. The judgment was right, and the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The plaintiffs did advance money on the faith of the document presented to them; it contained a statement as to the arrival of the goods and a form of order. It may be said that the document was only an intimation to men of business, and not a representation to be acted on; but the plaintiffs did not so understand it; as a matter of fact they were not negligent in not seeing that the document related to the same quantity of goods. It may be said that it is not proved that the documents were treated as delivery orders; but we must look at the facts, and it will be seen from them that the plaintiffs acted upon the documents presented to them. The form of the documents distinguishes this case from *Carr v. London & Northwestern Ry. Co.*, Law Rep. 10 C. P. 307. The documents are of a different kind. Certain recognized propositions were laid down in *Swan v. North British Australasian Co.*, 7 H. & N. 603; 2 H. & C. 175, and *Carr v. London & Northwestern Ry. Co.*, Law Rep. 10 C. P. 307. The present case falls within these recognized

principles. The judgment was right, and the appeal must be dismissed.

FRY, L.J.—I am of the same opinion. I think that there was some evidence of a custom to sell or pledge goods upon the faith of a document of this kind. Then was there any duty upon the railway company to take care? I think that they were bound to take reasonable care. The documents which are material are those of the 9th and 13th of December. Now the dates are most important; they are different, and therefore the rules of the company would have a different application. There was nothing to show that the documents related to the same goods except the word "charges" written across the second document; the second document requires a signature before the goods can be delivered, and it would be very strange if two signatures should be required for the same lot of goods. The documents were so different, that it could not reasonably be supposed that they related to the same lot of goods.

Then was the negligence of the defendants the proximate cause of the loss sustained by the plaintiffs? Here the second document was carelessly issued, and upon that the loss must be taken to have been sustained.

Appeal dismissed.

STATE ex rel. ATTORNEY GENERAL

v.

KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. Co.

(77 *Missouri Reports*, 143.)

Under the charter of the Missouri Valley R. R. Co. and its successor, the Kansas City, St. Joseph & Council Bluffs R. R. Co., and the acts amendatory thereof, the latter company is bound to maintain railroad connection between the cities of St. Joseph and Savannah and to run a train of cars daily between those points; but it is not bound to make Savannah a point on its main track, or to run all its trains to the old depot at that place. In maintaining a switch from this depot to the depot on the new line located and established under and by authority of the amendatory act of 1871, and running a train of cars daily over this switch to the old depot, the company sufficiently complies with the law.

Cases may arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief.

The peremptory writ of mandamus must conform strictly to the alternative writ.

David Rea & Son and Pembroke Mercer for relator.

B. F. Stringfellow, and Strong & Mosman for respondent.

HENRY, J.—This is a proceeding by mandamus to compel the respondent to run all its passenger and freight trains, and at least one train of cars daily, back and forth, to its depot in the town of Savannah, and to maintain and keep the depot there, so as to accommodate the passengers and shippers who may desire to ship produce and merchandise or to take passage from said depot. The whole controversy turns upon the construction of several acts of the legislature in relation to this respondent and the railroad company to whose rights it succeeded.

By an act approved March 8th, 1867, the Missouri Valley R. R. Co. had authority to locate, construct, use, operate and enjoy a railroad from a point at or near the western terminus of the Pacific R. R. through . . . the towns of Weston and St. Joseph . . . to the southern line of the State of Iowa, and on and over the roads located by the Atchison & St. Joseph, the Weston & Atchison, and the Platte County R. R. companies, or either of them, with the privilege of changing the line of the Platte County R. R. so as to run from a point in the city of St. Joseph, along the valley of the Missouri river by way of Forest City to the Iowa line . . . and of locating, constructing, using, operating and enjoying a branch road from the town of Savannah to the Iowa line, in the direction of Des Moines City. The act also contains the following: "Provided that nothing in this act shall be taken or construed to authorize said company, its successors or assigns, to change the general route, tear up, destroy or render unfit for ordinary railroad purposes that part of their railroad or any portion thereof, which extends from their connection in the city of St. Joseph with the road running south to Weston to their present terminus in the town of Savannah, but said road from St. Joseph to Savannah shall be kept in good running order, and at least one locomotive and train of cars shall be run daily back and forth over the same, accidents excepted, and Sundays at the discretion of the company; and in default thereof, all rights and privileges and franchises granted by this act are to be held as null, void, and of no effect." The Missouri Valley R. R. Co. took possession of said road and ran and operated the same from St. Joseph to said Savannah depot until the 11th of June, 1870, and during that time, constructed, as a part of its road, a road from said depot in a northern direction to the north line of the State of Missouri. In July, 1870, that company consolidated with the St. Joseph & Council Bluffs R. R. Co., and formed one company styled the Kansas City, St. Joseph & Council Bluffs R. R. Co. It is not denied that the latter company, the respondent herein, succeeded to the rights and assumed the obligations conferred and imposed by the act of 1867.

By an act of the general assembly approved February 8th, 1871, the respondent was authorized "to change the general route of that part of its railroad which extends from its connection in the

city of St. Joseph, with that other part of said road which runs south to Weston, to its present depot in the city of Savannah, so as to lessen the grades of said part of said road, and to cheapen the cost of operating the same; provided, that said company shall continue to keep and maintain its depot at Savannah at the present site of said Savannah depot." Under and in pursuance of that act the road from St. Joseph to Savannah was torn up, and a road constructed upon another route, which ran a half mile from the town of Savannah and formed part of the main line of respondent's road by connecting with that part of the road running north from Savannah. That portion of the latter road which lay between this connection and the old depot at Savannah has been used as a switch, on which trains of cars approach the old Savannah depot from the north.

Respondent contends that the act of 1871 repealed the proviso contained in the act of 1867. That it repealed so much of the proviso as related to changing the general route of that part of the road and tearing up the track, we entertain no doubt; but it by no means follows that the requirement to run a daily train of cars to the old Savannah depot was repealed. The act of 1871 expressly requires the company to "continue to keep and maintain its depot at Savannah at the present site of said Savannah depot." On any other hypothesis than that of the duty of the company to run a train of cars to that depot, as required by the act of 1867, the requirement to keep and maintain a depot at the site of the one already there is sheer nonsense. We assume that in changing the general route of the road between St. Joseph and Savannah the company has consulted the public interest and selected the best route attainable. Nothing now in the pleadings raises an issue on that point. We are also of the opinion that in merely maintaining a switch from its new depot north of Savannah to the old Savannah depot the company has not violated the letter or spirit of the act which authorized the change of the route of the road between St. Joseph and Savannah, and that, as the law now stands, the respondent is under a legal obligation to keep and maintain a railroad connection between St. Joseph and Savannah, and to run a train of cars daily between those points, as required by the act of 1867. But this is not all the relator asks. He also asks that the respondent be required to run all its trains to the old depot at Savannah, whether through or local, freight or passenger trains, going north or south, construing the acts in question in effect as requiring the company to make Savannah a point on the main line of its road and to run all its trains to the old depot. We do not think they bear this construction. The inconvenience and danger to the traveling public and shippers of produce and merchandise over the road is a strong argument against it. In the relator's view every train, both passenger and freight, whether it has a passenger or pound

of freight for Savannah, would have to be switched off of the main track and run down to the Savannah depot with no practical object in view, and at an unnecessary increase of the danger incident to switching trains, and occasioning delay ruinous to shippers and detrimental to all other interests than those of the town of Savannah, without benefiting the town in any conceivable, substantial manner whatever.

If such were the conceded law, whether a court would by mandamus compel a party to discharge such an obligation is by no means clear. "Cases may arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief." High on Extraordinary Remedies, § 9.

Holding that relator is entitled to a portion of what he asks for, but not the balance, can we grant the prayer and award a peremptory writ for that to which he is entitled? High, in his work above cited, says: "It is a well settled principle that the peremptory writ must conform strictly to the alternative mandamus, being necessarily limited as to form by the terms of the alternative writ. In other words, the courts are powerless to award the peremptory writ of mandamus in any other form than that fixed by the alternative writ. It follows, therefore, that if the alternative writ commands the doing of several things, it is incumbent upon the relator, in order to entitle himself to the peremptory writ, to show that he is entitled to the performance of all the things specified, and if he fails in any substantial part in establishing his title to any of the things sought, there can be no peremptory mandamus." § 548; Tapping on Mand. 327; Moses on Mand. 207; State ex rel. v. The Town of Pacific, 61 Mo. 158; State ex rel. v. Holladay, 65 Mo. 75. In the case of School District No. 1 v. The Board of Education of Lamar, 73 Mo. 627, the contrary was held. In that case, by an oversight, this court followed the case of the O. V. & S. K. R. R. Co. v. The County Ct. of Morgan Co., 53 Mo. 157, which was in effect overruled by the State ex rel. v. Trustees of the Town of Pacific, 61 Mo. 158, followed in the subsequent case of State ex rel. v. Holladay, supra.

For the foregoing reasons the peremptory writ is refused. All concur.

Mandamus.—A railroad company may be compelled by mandamus to perform the duties enjoined upon it by statute. State v. Gorham, 37 Me. 451; Cambridge v. Charleston Branch R. Co., 7 Metc. 70; Indianapolis & C. R. Co. v. State, 37 Ind. 489; People v. Rochester & S. L. R. Co., 14 Hun, 371; State v. Hartford & N. H. R. Co., 29 Conn. 538; State v. North Eastern R. Co., 9 Rich, 247; Indianapolis & Cinn. R. Co. v. State, 37 Ind. 489; Chicago & N. W. R. Co. v. People, 56 Ill. 365; Chicago & Alton R. Co. v. People, 67 Ill. 1; Mobile & Ohio R. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Union Pacific R. R. Co. v. Hall, 3 Dill. 515; s. c., 91 U. S. 343; United States v.

Union Pacific R. R. Co., 3 Dill. 524; People v. New York Central, etc., R. Co., 9 Am. & Eng. R. R. Cas. 1; State ex rel. v. Paterson, etc., R. Co., 9 Am. & Eng. R. R. Cas. 134; s. c., 10 Am. & Eng. R. R. Cas. 334; State v. Cheraw, etc, R. Co., 9 Am. & Eng. R. R. Cas. 631.

But see Smith v. Chicago, etc., R. Co., 67 Ill. 191.

QUEEN

v.

McLEOD.

(8 Canada Supreme Court Reports, 1.)

McL., the suppliant, purchased in 1880 a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway, and that he was greatly and permanently injured in body and health, and claimed \$50,000. The Attorney General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded \$36,000.

Held, that the establishment of government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways.

That the crown is not liable as a common carrier for the safety and security of passengers using said railways.

APPEAL from the Exchequer Court of Canada.

This was an action brought by the plaintiff by petition of right, to recover damages for injuries sustained by him, when a passenger in a railway car, on the railway in Prince Edward Island, owned by the Dominion of Canada and operated under the management of the Minister of Railways and Canals. The suppliant, in his petition, alleges that the railway in question was in the year 1880 run, worked and managed as a public work of the Dominion of Canada, and carried, for hire and reward, such passengers as pre-

sented themselves, and such freight as was offered to be carried from station to station, on said railway.

He therein further alleges that during that year he presented himself as a passenger on said railway from Charlottétown to Souris, and became and was received as a passenger between the two said stations on said railway for reward, Her Majesty promising in consideration of his becoming such passenger, for such reward, to safely and securely carry him upon the said railway, upon the said journey between the stations aforesaid; that all conditions were performed by the suppliant and all things happened to entitle him to be carried safely and securely by Her Majesty upon the said railway on the said journey, but that Her Majesty, disregarding her duty in that behalf and her said promise, did not safely and securely carry the suppliant on the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger as aforesaid on said journey, that, in the course of the said journey, the suppliant was greatly and permanently injured in body and health, and has become seriously incapacitated in his ability to earn a livelihood and has incurred great loss of time and expense in and about the cure of his wounds and injuries, and has suffered great pain of body in consequence of his injuries.

The suppliant claimed \$50,000 as damages.

The attorney general of the Dominion filed and served an answer to the suppliant's petition in which he admits that the railway in question was and is the property of Her Majesty, but says that the same was during the whole of the year 1880 under the control and management of the Minister of Railways and Canals of Canada, under the provisions of the statutes in that behalf.

In the third clause of his answer he says he has no knowledge of the alleged contract or of the facts and circumstances set out in the third paragraph of the suppliant's petition, and, therefore, on the part of Her Majesty, denies the same.

In the fourth paragraph of his answer he submits that the suppliant cannot enforce his alleged claim against Her Majesty by petition of right, and that the petition of the suppliant should be dismissed, and alleges as reasons:

1st. That the control and management of the railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because the same was negligently and unskilfully conducted, managed and maintained, as alleged; and,

2d. That even assuming the railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence of her servants.

The suppliant proves that he was a first-class passenger on the train which left Charlottetown for Souris on the 25th August, 1880, had paid his fare at the station at the former place, and had a first-class ticket; that he was in a first-class car, in which he travelled until the train reached a place called Robinson's curve, near York station, when it left the track. The railway carriages were upset over a bank, and the suppliant and several other passengers severely injured.

The train, on the occasion in question, consisted of an engine and tender, two flat cars loaded with coal, attached to the tender, and having on the top of the coal a large iron smokestack extending the length of the two cars; next to them was a luggage car, followed by a second-class car, to which was attached the first-class car, in which were the suppliant and several other passengers.

The gauge of the road was three feet and a half, and the rate of speed at the time of the accident was shown to be from 18 to 20 miles an hour. The curve was shown to be one of the sharpest on the line—the commencement of it being on a down grade, then nearly level for a few yards, succeeded by the up grade.

It was shown that the front one of the two flat cars was, where connected with the tender, eight to ten inches lower than the tender; that it was not connected therewith by the usual S link, but by a straight short one of not ten inches in length. It was satisfactorily shown, by evidence on the trial, that such a connection, when steam having been shut off going over a down grade and again used to increase the speed, has a tendency to lift the end of the car, and that momentum, suddenly given on a curve where the grade becomes an up one, is calculated to throw the cars off the track. Such was the position of the train when the accident occurred.

It was shown that the part of the road at the curve in question was made in 1873, and was built principally with spruce ties, the life of which was proved to be about seven years, at which age they become rotten and useless as such; very little, if any, substitution of new for old ties had been made on that curve after the road was built, and when the accident occurred it was shown that the ties for eighty yards were torn up and broken, the most of them into fragments of decayed wood. It was shown, by independent testimony of a large number of respectable and reliable witnesses, that for months before the accident several of the ties were so rotten that the ends of them outside the rails could be kicked off, and several proved that they had done so. Several persons also proved that, because of the rottenness of the ties, they could and did draw out with their fingers the spikes which connected the rails with them. On a curve where there is so much lateral pressure the result might legitimately be expected to be the spreading out of the rail on one side and the going off of the train. Such was shown

to have been the case where the train left the track. It was in evidence that the whole damage to the road was repaired by new ties, and the whole number required for doing so was charged by the trackmaster as having been used by him for that purpose.

To show the bad state of the ties on the two lines going east and west from Charlottetown, evidence was given that after the accident 90,000 ties were procured and were used subsequently to replace rotten ones on the two lines.

The only witness on the part of the defence who alleged the soundness of the ties was Hoole, the trackmaster at the section where the train went off; but his testimony was contradicted as to their state by upwards of thirty witnesses, as well as by his charge for repairing the damage to the road by all new ties.

A verdict was rendered for suppliant and subsequently

Lash, Q. C., and Hodgson, Q. C., for appellant.

Davies, Q. C., and A. F. McIntyre for respondent.

ROTHIE, C. J.—I cannot distinguish this case from that of *McFarlane v. Queen*, 7 Can. S. C. R. 216, nor can we sustain this judgment without overruling the decision of this court in that case, which I am not prepared to do.

This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty.

The suppliant's case is based on the allegation that being entitled "to be carried safely and securely by Her Majesty upon said railway on the said journey, Her Majesty, disregarding her duty in that behalf, and her said promise, did not safely and securely carry the suppliant upon the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger, that in the course of said journey the suppliant was greatly and permanently injured in body and health."

As between private individuals, it is thus laid down in all the text authors and sustained by the cases, that a carrier of passengers, not being an insurer and liable at all events as a carrier of goods is, actual negligence must be proved; it is not sufficient merely to show an accident, unless it is of such a description as to afford a presumption of negligence. See *Chitty and Temple on Carriers*, p. 309.

In actions against carriers for injuries to passengers by the negligence of the defendant it lies upon the plaintiff to prove the negligence, and not on the carrier to show that he used reasonable care.

And in *Chitty on Contracts*, 11 Am. Ed. vol. 1 p. 728, it is thus stated:

A carrier of passengers, therefore, is liable for personal injuries which they may sustain, whilst being carried by him, only where

such injuries have been occasioned by his negligence and unskilfulness.

The proposition is fully established by the case of *Crofts v. Waterhouse*, 3 Bing. 319. This was an action against a coach proprietor for having by the negligence and improper conduct of his servants overturned and injured the plaintiff—travelling in the defendant's coach.

Best, C. J. The action cannot be sustained unless negligence is proved.

Parke, J. The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events, except the act of God or the King's enemies—a carrier of passengers is only liable for negligence.

Aston v. Heaven, 2 Esp. 534, was a case against defendants as proprietors of the Salisbury stage coach for negligence in driving the said coach, in consequence of which the coach was upset and the plaintiff was bruised and her finger broken.

Eyre, C. J., said: This action is founded entirely on negligence. . . . I am of opinion that the case of loss of goods by carriers and the present is totally unlike . . . this action stands on the ground of negligence alone.

But the learned judge in the exchequer seems to base his judgment on the assumption that a carrier of passengers is liable at all events as a carrier of goods is, in other words an insurer, for as to the objection raised, "that Her Majesty cannot be made liable upon petitions of right because the same was negligently and unskilfully managed and maintained," the learned judge says: "The first answer I give to that objection is that the action is not brought to recover damages arising from the mere negligence of management or maintenance. It is alleged and proved that for a good consideration a valid contract was entered into by Her Majesty, and that she failed to perform it." Again, "If there was a contract in this case and a breach shown, a legal excuse or justification must be shown. If again, this action were against a company for the breach of a contract to carry and convey safely, the plaintiff's evidence that they did not do so, would be sufficient in the absence of proof of contributory negligence on the part of the plaintiff to put the defendants on their defence, it is only necessary in such cases to prove the contract and the breach with evidence as to the resulting damage." And again: "On sound principles of pleading and evidence the question of negligence or unskilfulness is no part of the issue where an action is brought on a contract to carry safely."

The learned judge was addressing these observations in reference to and dealing with what was assumed to be the contract in this case; but no such contract was proved as that Her Majesty promised, in consideration of suppliant being a passenger for reward,

safely and securely to carry him upon the said railway upon said journey between the said stations—the only evidence of any contract is that the suppliant paid his fare and received a ticket, as follows :

“Ticket, P. E. I. Railway, first-class, Charlottetown to Souris and return.

“August 25th, 1880.”

This indicates neither more nor less than that the holder had paid his toll and was entitled to a passage between the points indicated. Tolls on all public works are established under section fifty-eight of the Public Works Act, 31 Vic., ch. 12, which deals with all tolls in the same manner ; it is as follows :

The Governor may, by Order in Council to be issued and published as hereinafter provided, impose and authorize the collection of tolls and dues upon any canal, railway, harbor, road, bridge, ferry, slide, or other public works, vested in Her Majesty, or under the control or management of the Minister, and from time to time in like manner may alter and change such dues or tolls, and may declare the exemptions therefrom ; and all such dues and tolls shall be payable in advance and before the right to the use of the public work in respect of which they are incurred shall accrue, if so demanded by the collector thereof.

This doctrine of the learned judge might be all right enough, as between private individuals, if it could be established that carriers of passengers are, as carriers of goods were, insurers, or if there was an express contract to warrant and insure at all events the safe carriage of the passenger between the stations named in the ticket.

But the doctrine of the learned judge, as applicable to this case, cannot, in my opinion, be sustained.

The establishment of the government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane v. Queen*, *ubi supra*, a branch of the public police, created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation—it was constructed as a great public undertaking essential to the consolidation of the union of British North America, and in fulfilment of a duty imposed on the government and parliament of Canada by the British North America Act.

And so with respect to the P. E. I. Railway now in question. We find from the Journals of the House of Assembly of P. E. I., 1871, p. 109, the following history of the legislation and reason for its construction :

Whereas, the trade and export of this island have much increased during the past few years; and whereas, it is found almost impossible, in the absence of stone or gravel, to keep the roads in an efficient state of repair, to render easy the transport of the production of the colony; and whereas the construction and maintenance of a line of railway through the island would greatly facilitate its trade, develop its resources, enlarge its revenue, and open more frequent and easy communication with the neighboring Provinces and the United States.

Resolved, that a bill be introduced authorizing the government to undertake the construction of a railroad, to extend from Cascumpec to Georgetown, touching at Summerside and Charlottetown, and also branches to Souris and Tignish, at a cost not exceeding five thousand pounds currency, per mile, for construction, including all surveys and locating the line, and all suitable stations, station houses, sidings, turn-tables, rolling stock, fences, and all the necessary appliances suitable for a first-class railroad, and the construction of suitable wharfs at Cascumpec, Summerside, Charlottetown and Georgetown, provided the contractors for building and furnishing the said railroad accept in payment the government debentures of Prince Edward Island, at thirty years at par, without allowance for discount or otherwise.

On Prince Edward Island becoming a part of the Dominion this public undertaking became the property of the Dominion, the management, direction and control of which the legislature has entrusted to the Board of Works, under statutory provisions, for the benefit and advantage of the public; and being thus established for public purposes, it is subordinate to those principles of public policy which prevents the crown being responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on these public works, and therefore the maxim respondeat superior does not apply in the case of the crown itself, and the sovereign is not liable for personal negligence, and, therefore, the principle *qui facit per alium facit per se*, which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or retaining a careless servant, is not applicable to the sovereign, to whom negligence or misconduct cannot be imputed, and for which, if it occurs in fact, the law affords no remedy; for as Mr. Story says, "the government does not undertake to guarantee to any persons the fidelity of any of the officers or agents it employs, since it would involve it in all its operations in endless embarrassment and difficulties and losses which would be subversive of the public interests."

In this respect the law places the crown in reference to the post office, railways, canals and other public works, and undertakings, and those availing themselves of the convenience and benefit of

such institutions, in no better or no worse positions than if they were owned by private individuals, who made it an express stipulation that they should not be liable to parties dealing with them for the consequences of the negligence or misconduct, wilful or otherwise, of their agents and servants. This, of course, does not touch or affect the question of the liability, or the personal responsibility to third persons of officers or subordinates for acts and omissions in their official conduct when injuries and losses have been sustained, still less, where they are guilty of direct misfeasances to third persons in the discharge of their official functions.

There is therefore nothing unreasonable in limiting the liability of the crown and freeing it from liability for negligences and laches of its servants; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.

The public who use these government railways must understand what the law is, to what extent the law, on principles of public policy, prevents actions being brought against the crown for injuries resulting from the non-feasance or misfeasance of its servants—in other words, parties dealing with the crown, in reference to these great public undertakings, deal subject to those prerogative rights of the crown and those rules and principles, well known to the law, which, on considerations of public policy, are applicable to transactions between the crown and a subject, but not between subject and subject.

To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles. These prerogatives of the crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, “for the private gratification of the sovereign”—they form part of and are generally speaking “as ancient as the law itself.”

The judiciary of the United States of America, ignoring prerogative rights, deal with matters, such as this on principles of public policy, on the ground of the principles of the common law.

Thus in *Johnson v. United States*, 2 Nott & Hunt, 413, Nott, J., says, in the Court of Claims:

This court has again and again held to the principle of the common law that the government cannot be sued in an action sounding in tort, nor made liable for the tortious acts of its officers.

This constitutional principle this court cannot ignore; it must not attempt to make laws; it must administer the law, constitu-

tional, local, public or private, as it is, and leave the Dominion Parliament, on general and constitutional questions affecting the whole Dominion, and the provincial assemblies, on local questions, each within the scope of their legislative functions, as declared by the B. N. A. Act, to alter or adapt the practices or principles in force, to make them, if found expedient so to do, more suitable and applicable to the circumstances of the country. As to the statutes which it is alleged recognize the right of a party to recover for damage or injuries sustained on any railroad, see 31 Vic., ch. 12; 33 Vic., ch. 23; 44 Vic., ch. 25.

The crown not being liable, it is only necessary to say that in a case such as this at common law, if the legislature has given a remedy, the remedy prescribed must be pursued, because the statute gives no action at common law, there is only the statute to be relied on, it being clearly established that, where a new right is created by statute, the remedy is confined to that given by statute.

The statute 38 Vic., ch. 12, repealed by 39 Vic., ch. 27, giving power to this court to deal with petitions of right, expressly enacts that nothing in it shall prejudice or limit otherwise than therein provided the rights, privileges or prerogatives of Her Majesty or her successors, or give to the subject any remedy against the crown in any case when not entitled in England, under any circumstances, by laws in force prior to the passing of the Imperial Statute 23 and 24 Vic., ch. 34.

I have not felt it necessary to go more minutely into the cases bearing on the questions involved in this case as they can be found in *McFarlane v. Queen*, *ubi supra*. Under these circumstances, I am constrained to the conclusion that the judgment must be reversed, and this court should declare that the suppliant is not entitled to the relief sought by his petition.

I may be permitted to add that the suppliant in this case has my deepest sympathy, and, I trust, that an application on his part to the grace, favor and bounty of the crown may yet enable him to get that relief which this court has been unable to grant him.

Form of Action where Passenger Injured.—When a passenger is injured while being transported by a railroad company, the usual form of action is tort. Such was in former times always the action brought against common carriers for personal injuries. *Ansell v. Waterhouse*, 6 M. & S. 385; *McCall v. Forsyth*, 4 W. & S. 179; *Heven v. McCaughan*, 32 Miss. 17; *Saltonstall v. Stockton*, Taney's Dec. 11; *Frink v. Potter*, 17 Ill. 406; *Pennsylvania R. Co. v. People*, 31 Ohio St. 537; *Cregin v. Brooklyn, etc., R. Co.*, 75 N. Y. 192; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Ames v. Union R. Co.*, 117 Mass. 541; *Hammond v. North Eastern R. Co.*, 6 S. C. 180; *Nevin v. Pullman Palace Car Co.*, 11 Am. & Eng. R. R. Cas. 92.

But an action may also be brought in assumpsit for a breach of the contract to carry safely. *McCall v. Forsyth*, 4 W. & S. 179; *Fink v. Potter*, 17 Ill. 406; *Saltonstall v. Stockton*, Taney's Dec. 11; *Bayless v. Lintot*, L. R. 8. C. P. 345.

Sovereignty cannot be Sued.—That a sovereign State cannot be sued without

its own consent, see *Cohens v. Virginia*, 6 Wheat. 411; *United States v. Clarke*, 8 Peters. 444; *United States v. Bamey*, 8 Hall, L. J. 128; *United States v. Wells*, 2 Wash. C. Ct. 161; 2 Op. of Att'y Gens. 967; *Johnson v. United States*, 2 Nott & Hunt, 391.

SMITH

v.

ST. PAUL CITY RY. CO.

(*Advance Case, Minnesota. April 2, 1884.*)

Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest neglect. This rule extends to the management of cars and track, and to all the arrangements necessary for the safety of passengers as respects accidents from collision or otherwise.

Where an injury to a passenger occurs through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of plaintiff's own case.

It is not error for the trial court to refuse an application to allow the jury to witness experiments with cars upon a railway track outside the courtroom, as bearing on the question of the practicability of an alleged collision.

Upon the issue raised by the pleadings, whether plaintiff was a passenger at the time of the accident, *held*, that the jury were properly instructed that if the plaintiff was not actually on the platform of the car, but had hailed the car, and the car had stopped for the purpose of enabling him to take passage, and he was in the act of carefully and prudently attempting to step on the platform, he is to be regarded as a passenger.

APPEAL from an order of District Court, Ramsey County.

C. K. Davis for respondent Howard Taylor Smith.

H. J. Horn and O'Brien & Wilson for appellant the St. Paul City Ry. Co.

VANDEBURGH, J.—This action is brought to recover damages for personal injuries alleged to have been caused by a collision between two street cars of the defendant, on one of which plaintiff claims to have been a passenger. Defendant denies that he was a passenger, and insists that under the circumstances it is liable for the exercise of ordinary care only.

Upon this question plaintiff's evidence tends to show that he had reached the car, which had stopped for him at a crossing, and was endeavoring to enter it by a single low step, in the rear and

centre of the car, between the rails ; that while he was on the step and in the act of opening the door, which opened with difficulty, he heard the noise of another car approaching, which was unexpectedly brought into collision with the one he was entering, and he was thereby struck, knocked down, and severely hurt. The defendant's evidence also tends to show that the forward car had stopped and was waiting for plaintiff, and that he had passed to the rear thereof and stood between the rails, where he was seen by the driver of the rear car before the accident. The court charged the jury that "if the plaintiff was not actually on the platform, but had hailed the car, and the car had stopped for the purpose of enabling him to take passage, and he was in the act of carefully and prudently attempting to step upon the platform, he is to be regarded as a passenger." This instruction was correct as a legal proposition, and also clearly within the evidence, which, taken together, is amply sufficient to support the finding that the plaintiff had accepted the defendant's invitation to take passage, which had been signified by its stopping the car and waiting for him to enter it ; that he was in the act of entering it, and had so far placed himself in the charge of the defendant as to be entitled to the protection of a passenger. The rule is not inflexible that to entitle a person to such protection he must be actually within the vehicle or upon some portion of it. Otherwise he might in good faith, and in the exercise of due care, place himself in a position of peril while in the act of taking passage, upon the consent and invitation of the carrier, and the latter be bound to the exercise of ordinary care only. *Brien v. Bennett*, 8 Car. & P. 724 ; *Allender v. Railroad Co.*, 37 Iowa, 270 ; *Gordon v. Railroad Co.*, 40 Barb. 550 ; *Com. v. Railroad Co.*, 129 Mass. 501 ; *Thomp. Carr.* 42 ; *Hutch. Carr.* § 556 ; *Shear. & R. Neg.* § 262.

The defendant was a carrier of passengers for hire, owning and controlling the tracks and cars operated thereon. It is therefore subject to the rules applicable to passenger carriers. *Thomp. Carr.* 442 ; *Barrett v. Street R. R.*, 1 Sweeny, 568 ; 8 Abb. Pr (N. S.) 205. As respects hazards and dangers incident to the business or employment, the law enjoins upon such carrier the highest degree of care consistent with its undertaking, and it is responsible for the slightest negligence. *Wilson v. N. P. R. Co.*, 26 Minn. 280 ; *Warren v. Railroad Co.*, 8 Allen, 233 ; 43 Amer. Dec. 354, 356, notes and cases. This rule extends to the management of cars and track, and to all the subsidiary arrangements necessary for the safety of passengers. *Simmons v. S. B. Co.*, 97 Mass. 368 ; *Meier v. Railroad Co.*, 64 Pa. St. 230. It would, of course, also be applicable to the proper arrangements for running street cars upon the same track, in respect to risks and dangers of accidents from collision.

In support of the charge of negligence in the management of

the rear car (No. 26), and the horses attached to it, plaintiff's evidence tended to prove that before he reached the forward car (No. 8) he saw car 26 approaching upon an up grade, about one-half block away, and moving at the usual rate of speed; that, while he was in the act of entering the car which stood waiting for him, hearing a noise on the track behind him, he looked around and saw the horses of car No. 26 approaching rapidly, and immediately the collision occurred in which he was injured. The horses of car 26 were turned to the right and run off the track, and immediately stopped in the street alongside of car No. 8, which was also thrown off the track. Assuming the testimony of plaintiff and his witnesses to be true, it is evident that the forward car must have been struck either by the horses or some part of car No. 26, and that plaintiff was struck and injured thereby. We think it is also evident that the horses must have started into a gait much more rapid than usual in such service, or proper, considering the proximity of the forward car; but plaintiff's evidence, however, failed to explain this, and though it included the testimony of passengers in car No. 26 at the time, it did not appear as a part of plaintiff's case that the horses had in fact become unmanageable, or were actually "running away." The collision occurred in the evening, and during a storm, but the streets were sufficiently lighted, so that the plaintiff and car No. 8 were discernible by the driver of car No. 26. No adequate or satisfactory cause, therefore, for the happening of the accident and injury to the plaintiff, consistent with due diligence on the part of the defendant, is disclosed by plaintiff's case.

The severe rule which enjoins upon the carrier such extraordinary care and diligence, is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers it naturally follows that where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises. The general rule is thus stated in *Scott v. London Dock Co.*, 3 Hurl. & C. 596.: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management used proper care, it affords reasonable evidence in the absence of explanation by defendant that the accident arose from the want of care."

The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter,

owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of an accident, which he might be interested to withhold, and which the passenger could not know and might himself be unable to prove. *Thomp. Carr.* *211. The application of this rule is not limited to a breakage or defect in the vehicle in which the passenger is carried, but "extends to any other thing which the carrier can and ought to control, as a part of its duty to carry passengers safely." *Meier v. Railroad Co.*, *supra*; *Feital v. Railroad Co.*, 109 Mass. 405. Hence the fact of a collision between cars belonging to the same company upon a railway track is considered *prima facie* evidence of negligence on the part of the company, and it is not necessary for the plaintiff to prove specifically in what it consisted. If it occurred without the fault of defendants it is ordinarily for them to show it. *Skinner v. Railroad Co.*, 5 Exch. 787; *Railroad Co. v. Pollard*, 22 Wall. 343; *Ang. Carr.* (5th Ed.) §789. Where, however, the plaintiff's own evidence shows the operation of causes beyond the control of the carrier, as the presence of *vis major* or the tortious act of a stranger, tending to produce the accident, the plaintiff, in order to make out a *prima facie* case, will generally be obliged to go further and prove the actual concurrence of the negligence of the defendants as an operating and efficient cause, or that by the exercise of due diligence the accident might have been avoided. *Whart. Neg.* §661; *Thomp. Carr.* 213; *Le Barron v. Ferry Co.*, 11 Allen, 317; *Gillespie v. Railroad*, 6 Mo. App. 558. The reason of the distinction is so plain that in practice it is not difficult to apply the correct rule.

In the case at bar, plaintiff's evidence did not tend to prove that the accident was attributable to extraordinary causes beyond defendant's control. The burden, therefore, devolved upon defendant to exonerate itself from liability by showing that the collision was due to inevitable accident, or some cause for which it was not responsible. *Skinner v. Railroad Co.*, *supra*. The motion to dismiss the action was properly denied, and the rule laid down by the court as to the burden of proof in such cases was correct.

4. The issues embracing the questions of plaintiff's contributory negligence, the circumstances of the accident, and the nature and extent of his injuries, were fairly submitted to the jury by the court, and must be presumed to have been found for plaintiff. And upon the question of contributory negligence the court properly instructed the jury that the plaintiff was bound to exercise ordinary prudence only, while the defendant's obligation involved the strict rule of liability imposed upon carriers. *Johnson v. Railroad Co.*, 11 Minn. 304 (Gil. 204).

The court properly refused the defendant's fifth request, wherein the court was asked to charge the jury "that if they found that

the injury complained of was caused by the running away of the horses attached to car No. 26, through fright, caused by the hail-storm, it would be necessary, in order to entitle plaintiff to a verdict, that he should prove by a fair preponderance of evidence that the defendant was negligent in the management of car No. 26 during the runaway, and that the injury complained of was occasioned by such negligence." We understand this to mean that, upon proof that the accident was occasioned as alleged, defendant was prima facie exonerated, and thereupon the burden was cast upon the plaintiff to prove specific negligent acts or omissions in the premises. Plaintiff had made a prima facie case which disclosed evidence of the circumstances of the accident, and which defendant was called upon to rebut. Now the bare fact, if established by the defendant, that the collision was occasioned by the team running away through fright at a storm, or from any other cause, does not of itself, disconnected with the agencies controlled by defendant, imply that the accident was inevitable. *Sullivan v. Railroad Co.*, 30 Pa. St. 239. It was not, therefore, alone sufficient to rebut the plaintiff's case, or to cast upon him the burden of proving specific negligence or mismanagement. *Karson v. Railroad Co.*, 29 Minn. 15. The teams, cars, and their management belonged to the defendant. It was its duty to exercise the highest practical diligence and foresight as respects the danger of accidents of this kind, and to run cars upon the same track at suitable distances apart, and also employ skilled drivers and safe teams, and through its servants to exercise due care and skill in the management and control of the horses, in any emergency likely to arise in the service or business. Whether an accident resulting from the alleged cause may or may not have been consistent with the highest care and skill is to be determined by the evidence; but to constitute a defence it should so appear. So the court considered, and fairly left to the jury to determine, upon the evidence in the case, whether defendant exercised proper care under the circumstances to prevent the accident.

It was not error for the court to refuse the defendant's application to allow the jury to proceed to the car-house of defendant and witness experiments with these cars as bearing upon the question of the nature of the alleged collision. The case was not within the provisions of the statute allowing a view by the jury, and if such procedure were authorized or proper in any case, the question would be one resting in the discretion of the court. See *Stones v. Menham*, 2 Exch. 386.

Order affirmed.

Occurrence of Accident to Passenger is Prima Facie Evidence of Negligence.—It is a well-recognized doctrine that where an injury occurs to a passenger by reason of any occurrence which might be attributable to the negligence of the carrier, the occurrence of the accident itself constitutes a

prima facie presumption of negligence. *Great Western R. R. Co. v. Braid*, 1 Moo. C. C. N. S. 101; *Carpue v. London, etc., R. Co.*, 5 Q. B. 749; *Railroad Co. v. Pollard*, 22 Wall. 841; *Bowen v. New York, etc., R. R. Co.*, 18 N. Y. 408; *Sawyer v. Hannibal & St. Jos. R. Co.*, 87 Mo. 240; *Walker v. Erie R. Co.*, 63 Barb. 260; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; *Toledo, etc., R. R. Co. v. Beggs*, 85 Ill. 80; *Pittsburgh, etc., R. Co. v. Thompson*, 56 Ill. 138; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Galena, etc., R. Co. v. Yarwood*, 17 Ill. 502; *Romp v. Wilmington, etc., R. Co.*, 9 Rich. L. 84; *George v. St. L., I. M. & R. Co.*, 1 Am. & Eng. R. R. Cas. 294; *Iron R. R. Co. v. Mowbry*, 3 Am. & Eng. R. R. Cas. 361; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 3 Am. & Eng. R. R. Cas. 457; *Cleveland, etc., R. R. Co. v. Newell*, 3 Am. & Eng. R. R. Cas. 483; *New York, etc., R. Co. v. Dougherty*, 6 Am. & Eng. R. R. Cas. 139; *Phila. and Reading R. Co. v. Anderson*, 6 Am. & Eng. R. R. Cas. 407; *Cleveland, etc., R. Co. v. Newell*, 8 Am. & Eng. R. R. Cas. 377. But see *Bird v. Great Northern R. Co.*, 28 L. I. 3; *Withers v. North Kent R. Co.*, 27 L. I. (Exch.) 417.

The rule applies equally whether the injury be occasioned by a defect in machinery or track, or by the negligence of servants. *Ohio & Miss. Packet Co. v. McCool*, 8 Am. & Eng. R. R. Cas. 390.

Rule as Applied to Passenger Carriers other than Railroad Companies.—The rule applies in the case of passenger carriers other than railroad companies. *Stokes v. Saltonstall*, 13 Pet. 181; *Fairchild v. California Stage Co.*, 13 Cal. 599; *McKenney v. Neill*, 1 McL. 540; *Ware v. Gay*, 11 Pick. 106; *Wilkie v. Bolster*, 3 E. D. Smith, 327; *Roberts v. Johnson*, 58 N. Y. 613; *Simpson v. London, etc., Omnibus Co.*, L. R. S. C. P. 390.

Exceptions.—The principle does not apply in the following cases:

(1) Where the injury is produced by some cause entirely outside the duty of the carrier to the passenger. *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Federal St. & P. V. R. Co. v. Gibson*, 11 Am. & Eng. R. R. Cas. 142.

(2) Where the injury is produced by some voluntary act on the part of the person injured, which, though not contributory negligence, is the sole *causa causans*. *Railroad Co. v. Mitchell*, 11 Heisk. 400; *Metropolitan R. R. Co. v. Jackson*, L. R. 3 App. Cas. 193.

(3) Where the injury is produced by an alleged defect in the equipment of the company perfectly patent to the person injured. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *D. L. & W. R. R. Co. v. Napheys*, 1 Am. & Eng. R. R. Cas. 52.

WHEELWRIGHT

v.

BOSTON AND ALBANY R. R. Co.

(135 *Massachusetts Reports*, 225.)

At a railroad station, the tracks ran easterly and westerly. On the south side of the tracks were the station-house, and a platform over five hundred feet in length, which ran, on the east, to a highway crossing the railroad at grade. On the north side of the tracks was a platform five hundred feet in length, which ran, on the west, to a passageway leading from a highway

parallel with the railroad on its northerly side. Between the two platforms were two strips of planking, each ten feet wide, and the rest of the space was left unplanked. The railroad tracks were straight from the passageway for the distance of a quarter of a mile in an easterly direction. Passengers going eastward could only enter the cars from the south platform. A woman, who lived on the north side of the railroad, intending to take a train going eastward, went, in the daytime, down the passageway to the northerly platform, and found a freight train passing, which was going westward. She waited until it had passed, looked eastward to see if any other train was coming, and saw none. Her attention was then attracted to the incoming of the train on which she was going, and knowing that, by the rules of the road, while one train was at a station another was not allowed to pass, and that one train was not allowed to follow another within five minutes, she, without looking again to see if a train was coming, stepped on the north track, attempted to cross at a place where there was no planking, and was struck by a train coming from the east, a few hundred feet behind the other freight train. *Held*, in an action against the railroad corporation for the injuries sustained, that there was no evidence to warrant a finding that the plaintiff was in the exercise of due care, although, for nearly twenty years, persons coming from the north side of the railroad had been accustomed to cross to the south platform in the place where the plaintiff was attempting to cross.

TORT for personal injuries occasioned to the plaintiff by being struck by a locomotive engine belonging to the defendant. Trial in the Superior Court, before Mason, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff introduced evidence tending to show the following facts:

The defendant's railroad at Newton consists of two tracks, the southern track being used for trains running toward Boston, and the northern track for trains from Boston. The station building, in which are the ticket-office, baggage-room, etc., is on the south side of the road, and is one hundred and twenty feet long. A platform extends along its front and eastwardly eighty feet to the west side of Centre Street, a highway which crosses the railroad at grade, and westwardly three hundred and twenty-four feet beyond the building, making in all a platform of five hundred and twenty-four feet.

On the north side of the railroad a platform extends from Centre Street westerly to the end of a narrow passageway leading from Washington Street, this platform being five hundred feet long, and its west end being sixty-eight feet east of the west end of the platform on the south side of the railroad. Opposite the station building, and on the north platform, is a shed for the shelter of waiting passengers, twenty-five feet wide and seventy-five feet long, the west end of which is two hundred and eighty feet east of the passageway. Between the shelter shed and the station building are two strips of planking, each ten feet wide and thirty-three feet from each other. The crossing of the railroad and Centre Street is planked. There is no planking across the tracks at any

other place, but the tracks are left in the usual condition of railroad tracks, with nothing but rails and sleepers, and not filled up level with the sleepers, and with no preparation of the tracks to fit them for crossing by foot passengers. There was nothing to prevent people from crossing the tracks, except what is herein stated.

Passengers taking trains for stations east of Newton enter the cars from the south platform, and passengers leaving such trains get out upon the south platform. Gates are kept closed on the north side of the cars going toward Boston, so that passengers can neither get on nor off the cars on that side.

Passengers coming from Boston, or taking trains going west, leave or enter the cars by the north platform, and closed gates on the south side of such cars prevent people from leaving or entering such trains on the south side.

Both platforms were raised about a foot above the track. Washington Street runs nearly parallel with the railroad at the distance of about eight rods northerly from it, and connects with Centre Street, so that there is free access for dwellers on Washington Street, to the station building and the south platform by the highway.

The plaintiff, a woman seventy-two years old, was the holder of a commutation ticket, entitling her to ride to and fro between Newton and Boston. On the day of her injury she started from her house, which was on the south side of Washington Street, and immediately west of the passageway already referred to, for the purpose of taking, and in ample time to take, the twenty-three minutes past ten A.M. train for Boston. She passed from Washington Street into and through the passageway, which was narrow, and from which no view of trains coming from the east could be had. Two ladies were a short distance in front of her in the passageway. This passageway ends at a flight of three or four steps which lead to a landing connecting with the end of the north platform, which slopes gradually down to its level, which is about two feet below the general level of the platform. When plaintiff reached the foot of the steps a freight train was passing westward on the north track,—a regular freight train, as she understood it, about twenty minutes late. She waited there about two minutes until the last car had passed, and then went up the steps, and, standing on the landing, looked eastward to see if any other train were coming. She was familiar with the defendant's time table, and knew when trains were due at Newton, and that no other train was due at that time, and that the rules of the defendant did not permit trains to follow within five minutes of each other. While looking eastward, she saw the ladies who had preceded her in the passageway walking along the north platform. She did not see any train approaching, nor hear any bell or any whistle. While

she was looking, she was attracted by the incoming of the train which she was about to take; and, knowing that the rules of the defendant did not permit a train to pass a station while another was passing it, and supposing that no train would approach from the east, she stepped, a moment after, upon the north track, and was struck by the engine of a freight train coming on that track from the east, a few hundred feet behind the other freight train, and received the injuries complained of.

The ladies who preceded her in the passageway saw the locomotive engine, which struck the plaintiff, coming, immediately on arriving at the top of the steps. They walked slowly, and the engine of the passenger train which was coming from the west, on the south track, passed them when they were less than a hundred feet east of the passageway, and the engine of the train which struck the plaintiff passed them going west, on the north track, before they were a hundred feet east of the passageway. When they were about a hundred feet east of the passageway, the last-named engine whistled very sharply two or three times, whereupon they turned round and saw the plaintiff just upon the track. Other evidence, introduced by the plaintiff, tended to show that the engine which struck her whistled two or three times in quick succession before she was struck, and so sharply as to attract the attention of passengers in the passenger train, and before their car had met the engine which struck her; and that the engine which struck the plaintiff was drawing an extra freight train not on the time table.

Evidence introduced by the plaintiff further tended to show that the passageway through which she approached the railroad had been used by foot passengers for nearly twenty years, and that she and many others had been accustomed to use it; that the plaintiff and others, about to take trains for Boston, had been in the habit of stopping at the end of the passageway while their train was coming in, and then crossing the tracks and getting upon the rear car of the train, and that this was without objection from the defendant; that of those who came to the railroad premises through the passageway, some passed along the north platform easterly, some crossed the tracks opposite the passageway, and others crossed the tracks at various points between the passageway and the shelter shed; and that no objection had been made by the defendant to this practice.

The railroad track is straight, from a point west of the passageway, at least for a quarter of a mile east of the passageway; and if a person stands on the edge of the top step at the end of the passageway, without going toward the side next to the railroad track, the posts of the shelter shed would interfere with the view of a train approaching from Boston.

The plaintiff also introduced evidence tending to show that there was no flagman at the end of the passageway; and that no warning

was given the plaintiff not to cross, other than appears from the foregoing evidence. The north platform, except under the shelter shed, is ten feet wide. There is nothing on it between the passageway and the shelter shed, except that a lamp, upheld by a bracket fastened to the fence at the back or north side of the platform, projects over it some two feet, at the height of seven or eight feet, at a point one hundred and eighty feet east from the passageway. The roof of the shelter shed is supported by posts, which stand five feet north of the south edge of the platform, and in the neighborhood of Centre Street some shops front on the platform, and do not project over or upon it. About two thousand people live north of the railroad and west of the passageway.

On this evidence, which was all the evidence on the question of the liability of the defendant, the judge, at the request of the defendant, ruled that the action could not be maintained; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

T. Weston, Jr. for the plaintiff.

A. L. Soule for the defendant.

COLBURN, J.—In *Chaffee v. Boston & Lowell R. R.*, 104 Mass. 108, which was in some respects a similar case to the one at bar, the court say: "The plaintiff must show, by positive evidence, in cases of this description, that he was in the exercise of due care, and that his want of it did not contribute to the injury of which he complains. If, as a matter of common knowledge and experience, the court can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may be properly told, as matter of law, that he cannot recover."

In the case at bar, the plaintiff had ample opportunity to cross from the north to the south platform, either by the highway, or on the strips of planking designed for crossings, opposite the station building. She was attempting to cross at a place not designed or adapted for crossing, at which the defendant had held out no invitation or inducement for her to cross. The most that can be contended, on the evidence, is, that the defendant had tolerated a practice, which the plaintiff and others had adopted, of crossing where she was attempting to cross, without taking any active measures to prevent it. This is far different from an inducement or invitation from the defendant to cross there.

In *Chaffee v. Boston & Lowell R. R.*, *ubi supra*, the court say: "A person who attempts to cross a railroad track, under any circumstances, can hardly be said to be in the exercise of due care, unless he takes reasonable precaution to assure himself, by actual observation, that there are no approaching cars upon it. But the degree of caution he must exercise will be affected by the situation and surrounding circumstances." In that case, the plaintiff was

injured by being struck by a hand-car, with no light upon it, running at the rate of ten or twelve miles an hour, as he stepped from the platform on to the track, in a dark night.

In the case at bar, the accident happened in broad daylight, between ten and eleven o'clock in the forenoon; the track was straight for a quarter of a mile easterly from the place where the plaintiff stepped upon it; and there was nothing to obstruct her view of the track for that distance, from any point on the platform within five feet of its southern edge. The conclusion is irresistible, that the plaintiff's attention was so far occupied, by the approach of the train she was to take, that she omitted to look along the track she was to cross, and stepped directly in front of the train which struck her. Her knowledge of the rules of the defendant, that trains should not pass each other at stations, or follow each other within five minutes, did not, under the facts in this case, excuse her from taking the simple and obvious precaution of looking to see what might be coming on the track she was stepping upon.

The fact that the plaintiff held a ticket, or that the train she was about to take had arrived, did not authorize her to cross the track at an improper place, or take any less care to see that she could cross in safety.

Being of opinion that the plaintiff was wanting in due care, which contributed to her injury, both in attempting to cross where she did and in not looking for an approaching train, we have no occasion to consider the question of the negligence of the defendant.

Exceptions overruled.

Surroundings of Stations.—A railroad company is bound to use all reasonable care and precaution to have the exits and approaches to its stations safe for the convenience of passengers. *Indiana, etc., R. Co. v. Hudelson*, 13 Ind. 325; *Chicago, etc., R. Co. v. Wilson*, 68 Ill. 167; *Pittsburgh, etc., R. Co. v. Brigham*, 29 Ohio St. 374; *Clussman v. Long Island R. R. Co.*, 9 Hun (N. Y.), 618; *Gordon v. Grand Street R. R. Co.*, 40 Barb. 546; *Hulbert v. New York, etc., R. Co.*, 40 N. Y. 145; *Knight v. Portland, etc., R. Co.*, 56 Me. 234; *Vicksburg, etc., R. Co. v. Howe*, 52 Miss. 202; *Caswell v. Boston, etc., R. Co.*, 98 Mass. 194; *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. R. Cas. 65; *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. R. Cas. 254; *Stiles v. Atlanta, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 195; *Baltimore & Ohio R. R. Co. v. Hauer*, 12 Am. & Eng. R. R. Cas. 149.

In case of a neglect of this duty the company is liable to a person coming to or leaving the station intending to take passage on or having just left its trains; unless, of course, as in the principal case, such person has been guilty of contributory negligence. See authorities above cited.

CARTWRIGHT

v.

CHICAGO AND G. T. RY. CO.

(Advance Case, Michigan. February 8, 1884.)

If a railroad car is stopped at a place where it would not be safe for the passengers to alight, it is the duty of the company to give assistance or warning or move the car to a more suitable place.

It is not negligence per se for a passenger to leave the car by the rear end.

The evidence as to the negligence of both plaintiff and defendant was such that it was proper to submit the whole case to the jury.

ERROR to Genesee.

H. R. Lovell for plaintiff.

E. W. Meddaugh for defendant and appellant.

COOLEY, C. J.—This is an action for personal injury, and the plaintiff recovered in the circuit court. The only questions that need to be considered are—First, whether there was any evidence of negligence on the part of the defendant to be submitted to the jury; and, second, whether the evidence conclusively showed contributory negligence on the part of the plaintiff.

The injury occurred December 28, 1881. The plaintiff was a woman sixty years of age, and resided with her husband, who was still older and rheumatic, at Davision, a country station about nine miles west of Flint. On the day named she went to Flint with her husband, and returned on the evening train, which arrived at Davision about 9 o'clock. The train was composed of six cars, made up as follows: Mail car, express car, baggage car, smoker, way car, and sleeper. Plaintiff and her husband entered the way car, which they found full, and took the rear seat behind the door. It was a dark, cloudy and wet evening. When the train stopped at Davision the evidence tends to show that the smoker stood partially alongside the station platform, but the way car was not up to it. No light was displayed at the rear end of the way car, nor, as we conclude from the record, at the front end, but there was a light on the platform which would possibly aid in alighting there. A drunken man in one of the cars further forward appears to have had the attention of the men on the train when the train stopped, and aid was not given to the passengers in leaving the way car. The most of them went forward and alighted safely, but plaintiff and her husband got out at the rear end of the car. There is a road crossing at that place, and plaintiff was familiar with the locality. She had seen the cars stop there before, and passengers

step down into the road, and she thought the car then stood where if she stepped down she would step into the level part of the road. She therefore stepped down in the dark. She had several packages on her left arm, but her right hand was at liberty, and with that she took hold of the iron rod by the side of the steps. Instead of being over the level road as she supposed, the end of the car was over a depression at the side of the road, and when her foot left the step she went down so far that her hold of the iron was broken and she fell to the ground. Her foot slipped on the wet ground and turned under, and her leg was broken. She lay helpless until assistance could be procured. It was not until after the train had left that she was taken up and carried into the station, and medical assistance obtained. During all the time of the stop no one connected with the train or employed by the defendant was giving assistance to the plaintiff or her husband, or looking after passengers at the rear end of the car they had occupied.

It is contended on the part of the defence that the plaintiff was negligent in leaving the car where she did; that the only proper place for leaving was where there was light, and where assistance was provided, and that, if needful, she should have passed through the car in front of the way car from which, if not from the way car, she might have alighted upon the platform. It is further said that it is not expected passengers will leave the car at the rear end; their duty is to pass to the front and leave the other to passengers taking the car, who otherwise will be incommoded in getting aboard. And it is insisted the railroad company is under no obligation to station assistants at each end of every car to help passengers on and off; the burden would be an unreasonable one, and passengers have no right to demand or expect it. It would, no doubt, be better that travellers should always leave a car by the front end, and it might be competent for a railroad company to make and enforce a rule requiring it. But it is not shown that this defendant has any such rule, and it is certain that there is no general custom now observed by the public to that effect. Passengers not only do leave the cars at the rear and front indifferently, but they are suffered to do so without objection, and probably a very large portion of them all are not aware that it is desired they should do otherwise. Under such circumstances it cannot be said that it is negligence per se for a passenger to leave the car at the rear. If there was negligence in this case it must arise from the fact of the darkness, the known fact that the rear of the car was not at the landing, and the uncertainty in respect to the ground where it stood. If the front end of the car had been at the platform, there would have been more reason for insisting that the plaintiff should have gone in that direction. But we think a woman is excusable for not desiring to pass through the smoking car, and she has a right to assume it is not expected of her. We also think

that passengers, where not notified to the contrary, may rightfully assume that it is safe to alight from the car wherever it is stopped for passengers to leave it. And if no light is given them to leave the car by, they are not to be charged with fault for leaving in the darkness.

A review of the record satisfies us that the agents and servants of the defendant were not as careful and vigilant as they should have been in providing for the safety of the passengers in leaving the train. If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or to move the car to a more suitable place. This was decided in *Cockle v. London & S. E. Ry. Co.*, L. R. 7 C. P. 321, a case on its facts very similar to this; and the same principle has often been laid down in other cases. *Nicholson v. Lancashire, etc., R. Co.*, 3 Hurl. & C. 534; *Foy v. London, etc., R. Co.*, 18 C. B. (N. S.) 225; *Brassell v. N. Y. Cent., etc., R. Co.*, 84 N. Y. 241; s. c., 3 Am. & Eng. R. R. Cas. 380; *Penn. R. Co. v. White*, 88 Pa. St. 327; and *Balt. & O. R. Co. v. State*, Md. Ct. App. 12 Am. & Eng. R. R. Cas. 149, are among those so holding. There was therefore evidence to go to the jury on the question of negligence in the defendant. And the peculiarity of the case is such that the same facts which tend to show negligence in the railroad company tend in the same degree to show that the plaintiff was without fault. If she had a right to assume that the landing place was safe, she was not negligent in stepping down as she did. It must be conceded that she did not exhibit a very high degree of caution, but we cannot say that it was not as much as the average passenger would have shown under like circumstances. It was very proper, we think, for the circuit judge to submit the whole case to the jury.

The judgment must be affirmed.

The other justices concurred.

Obligation of Company as to place where Passengers alight.—A railroad company is bound to take care that the place where it calls upon its passengers to alight is reasonably safe for that purpose. *Hulbert v. New York, etc., R. Co.*, 40 N. Y. 145; *Knight v. Portland, etc., R. Co.*, 56 Me. 234; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa, 124; *Chicago, etc., R. Co. v. Fillimore*, 57 Ill. 267; *Vicksburg, etc., R. Co. v. Howe*, 52 Miss. 202; *Dillaye v. New York, etc., R. Co.*, 56 Barb. 30; *Seymour v. Chicago, etc., R. Co.*, 3 Biss. 43; *Weston v. New York, etc., R. Co.*, 10 Jones & Sp. 156; *Delaware L. & W. R. Co. v. Napheys*, 1 Am. & Eng. R. R. Cas. 52; *Hartwig v. C. & N. W. R. Co.*, 1 Am. & Eng. R. R. Cas. 65; *Chicago, B. & Q. R. Co. v. Sykes*, 2 Am. & Eng. R. R. Cas. 254. But see *Murch v. Concord, etc., R. Co.*, 56 Me. 234.

Contributory Negligence.—Where a passenger being aware that the train is not opposite a platform of his motion endeavors to alight at a place which is dangerous and in so doing is injured, the railroad company is not liable. *Taber v. Delaware, etc., R. Co.*, 71 N. Y. 489; *Central R. R. Co. v. Van Horn*, 38 N. J. L. 133; *Delamaty v. Milwaukee, etc., R. Co.*, 24 Wisc.

578; Evansville, etc., R. Co. v. Duncan, 28 Ind. 441; Columbus, etc., R. Co. v. Farrell, 31 Ind. 408; Stiles v. Atlanta, etc., R. Co., 8 Am. & Eng. R. R. Cas. 195; Cincinnati, etc., R. Co. v. Peters, 6 Am. & Eng. R. R. Cas. 136; Burlington, etc., R. Co. v. Raymond, 13 Am. & Eng. R. R. Cas. 6. But see Pabst v. Baltimore, etc., R. Co., 2 McArthur, 42.

And where a railroad company has provided a safe means of getting on and off the train, if a passenger elects to alight in a way of his own, different from that anticipated by the company, the latter will not be responsible for the consequences. Forsyth v. Boston, etc., R. Co., 103 Mass. 510; Pennsylvania R. R. Co. v. Zebe, 33 Pa. St. 318; s. c., 37 Pa. St. 420; Bancroft v. Boston, etc., R. Co., 97 Mass. 275; Gonzales v. New York, etc., R. Co., 50 How. Pr. 126.

PULLMAN PALACE CAR CO.

v.

GARDNER.

(*Advance Case, Pennsylvania. November 12, 1888.*)

It is the duty of a sleeping car company to use reasonable and ordinary care to prevent intruding, picking pockets, and carrying off the clothes of passengers while asleep, and whether such care was exercised under the circumstances is a question for the jury.

Where the regulations require a watchman to stay in the aisle of the car continuously until danger is over, and he goes out of the aisle even for a very few minutes, and during that time a robbery occurs, and the jury believe that if he had been in his place of observation it would not have occurred without detection, the company is liable. The watching must be continuous and active.

In this action, it was competent to prove that another person was robbed on the same night, and on the same car, as bearing upon the question of negligence.

ERROR to the Court of Common Pleas No. 1, of Allegheny county.

This was an action on the case to recover damages for the loss of a gold watch and some fifty dollars in money resulting from the alleged negligence of the defendant company, its agents and employees, in not exercising proper care in the protection of plaintiff and his effects while occupying a berth in a Pullman car between Philadelphia and Pittsburgh.

On April 8th, 1881, plaintiff purchased a ticket from the company at Philadelphia which secured him an upper berth in a sleeping coach leaving Philadelphia on the 11.30 P.M. train. There were on this train two sleepers in charge of five employees, the usual number, and consisting of a conductor, one cook, and three porters.

The plaintiff, on entering the car, had on his person a gold

watch valued at \$250 and about \$55 in money. His berth was already made up, and he retired shortly after the train started. Before getting into his berth he took off his coat and vest, put his watch and pocket-book in the inside pocket of his vest, and put it under the outside corner of the mattress of his berth, lay down and was soon asleep, and did not awake until near Huntingdon, about seven o'clock next morning, when the passenger conductor called for his railroad ticket. On looking for it he discovered that his watch and money were gone. He called the porter and sent him to tell the conductor, who came, and the plaintiff made known to him that he had been robbed. Officers were telegraphed for and met the train at Tyrone to search the passengers, but the missing property was not found. Two passengers who had taken berths from Philadelphia to Altoona got off at Harrisburg, and from this fact were suspected as being the guilty parties. Every effort was made by the agents and employees of the company to detect the thieves, but of no avail.

The conductor of the sleeper remained on duty in the coach until 3 A.M., when he left his post and put the colored porter upon guard, who went out for a time to black boots. The regulations required a continuous watch during the night.

On the trial the plaintiff offered in evidence a conversation between himself and the porter touching the loss when first discovered, to which defendants' counsel objected as well as to the offering in evidence the deposition of C. C. Darling to prove that he had, on the same night, lost his watch and pocket-book.

The court (Stowe, P. J.) charged the jury as follows :

The question of law suggested in this case, as you have already heard intimated, is, in many respects, a new one; and it gives some indications of how, with the improvements of the age, new questions arise for the courts to settle. When suits for losses in sleeping cars were first brought it was sought to be established that the old doctrine of the liability of inn-keepers and common carriers of goods applied, that, like inn-keepers and common carriers, sleeping car companies were insurers. At common law if I gave property to a common carrier he had to deliver it to me perfectly safe and sound as he got it, the acts of God and the king's enemies alone relieving him from so doing. Practically that is all done away with now by bills of lading making exceptions and reservations. So an inn-keeper was an insurer of your property to the same extent. If a mob should break into his house, carry off your trunk, destroy your goods, he was responsible. Nothing but lightning, storm, or the king's enemies that were in open rebellion, not simply rioters, but what assumed the dignity of armed rebellion, relieved him from liability. It became very apparent that this doctrine could not be applied to our times and our different circumstances, and the great difficulty has been to find some legal, solid

principle on which to base actions of this kind, so that the carrier, who in this case is the sleeping car company, and you and I, and everybody else who uses sleeping cars should also have reasonable protection. In an ordinary car, upon any railroad, if you or I purchase a ticket, sit down and go to sleep, and somebody picks our pocket, the company is under no sort of obligation to make good our loss. It is bound to carry us safely, so far as our persons are concerned, but it is under no sort of obligation to keep people from robbing us except it would be by an onslaught, open violence on the cars. In such case it has been held that the conductors are bound to protect, not only the persons of passengers, but also their property to a reasonable extent, as, for instance, if some boy, fifteen years of age, with a wooden gun in his hand, would come in to rob a car, as I believe it is said they do out West, and the passengers should crawl under the seats, and the conductor and train hands run away, when, perhaps, if they had stood their ground they would have prevented it, the railroad company might be responsible if the jury should not find, under the circumstances, that the passengers ought to have defended themselves. We used to ride around in stage coaches. If robbed while in them the company, being under no obligation to carry a guard, was not responsible for the robbery, although you might go to sleep, and they know perfectly well you would go to sleep, or ought to suppose you would, for a man could not ride half a dozen days or nights without going to sleep; but in the case of a sleeping car company the great convenience and inducement held out to passengers is, that they will give them a comfortable night's rest. They notify them they will make them pay for it, and say to them you may go to sleep. The principal part of the arrangement is the advantage the passenger will have over an ordinary car, that he can lie down and go to sleep. When you have gone to sleep, of course, you can't take care of yourself, everybody knows that, and for that very reason, the fact that the company notifies you to lie down and shut your eyes and go to sleep and thus become helpless, it is their duty to take care of you while you do sleep, not that they are insurers, not that they say you shall not be robbed, or cannot be robbed, but they will use reasonable and ordinary care to prevent people intruding upon you and picking your pockets or carrying off your clothes while you are asleep. That is the principle that should underlie all of these cases, and it strikes one it is founded on good sense and good logic. They know that there are certain dangers to the sleeping passengers; their experience, common sense, without that, would say that there were dangers. They know that anybody and everybody, provided they are ordinarily respectable looking, can ride in their cars. They know the possibility of robbery, and they therefore, when they notify you to close your eyes and rest, we will not say you shall not be robbed, but we will say we will exer-

cise a reasonable and ordinary care to protect you from robbery. Applying that principle you will inquire: Did, or did not this company, at the time this transaction occurred, on this particular car, do its duty, and if so, did the parties it had employed do their duty in guarding the car that night against just such robbery as occurred? We have it in evidence that the company has done its whole duty, as a company. They require a constant watch to be kept, some person in the body of the car where the sleepers are, watching continuously, Mr. Smitley and the conductor both say that. If watch were kept by one I apprehend it would be sufficient.

Of course there are many cases that no protection could guard against. It is apparent that these berths must be made in such a way that the head-boards may be easily moved, slipped out; and without you would keep a watchman at every berth, there might be some fellow so expert as to be able to move one out and not be detected, just as many thieves can stand right before your face and talk to you and at the same time pick your pocket, and you never suspect it. It is a sleight of hand that seems to be peculiar. Against thefts of that kind the company are not bound to protect you; but they are bound to protect you against such thefts as reasonable care will guard against. In this case, the evidence satisfies me, and it would seem that is the reasonable conclusion from the testimony—that, however, is for the jury—first, that the regulations of this company were reasonable and proper. They kept a guard according to their regulations, and intended to keep a continuous watch, so that a man sitting there could see everything that was going on without interfering with the sleepers. He would have no business to be away except in a special case. They station him at the end of this little aisle where he can see the whole length of the car, see anybody undertaking to crawl from one berth to another, or anybody in the aisle. It is lit up sufficiently to be able to distinguish objects. These Pullman cars seemed to have been sufficiently manned. There were five employees altogether. One man seems to me to have been quite enough at a time to guard a car in the way that ordinary care would require it to be guarded. The conductor says he was awake in the car till three o'clock, I believe it was; says he was there continuously and watched continuously. So far, if that is true, he must have done his duty. He left his post of observation or watch, and put the colored porter upon guard. Now, the question for you to determine, if you find that reasonable care was exercised, as I think it was, up to that time is, Did this colored man do his duty? There is no evidence to indicate that he was not a sufficiently proper man. Therefore the company would not be liable for having employed a man not fit for the purpose. [Did he do his duty? The regulations required him to stay in the aisle of the car continuously, to watch there

continuously, until the danger was over, until daylight. Did he do it? If so, where is the evidence of it? We have his own declarations that he was on guard, coming from the conductor; but we have also his own declarations to the plaintiff that he went out of that apartment for a time to black a pair of boots or shoes. If he went out of that aisle, even for a very minutes, and during that time this robbery occurred, and the jury believe that if he had been in his place of observation, it would not and could not have occurred without detection, the company is liable, because he failed to do his duty to that extent that it allowed this robbery to be done. It was his fault and it is visited on the company, although they may have done everything they thought right to get a proper man. "Watching" is not simply to be on watch nominally, it is to be on watch actually, to be there, not under pretence of continuing there; there till you get tired and then go out and lie down or do something else, and let the very thing occur you are put there to avoid; watching must be continuous and active. He could not watch a car full of sleeping people very well if he were in the front part in those little rooms or ante-chambers, or whatever they are called, where people dress and wash.

The counsel have directed your attention to the principal facts involved in the case. If you think the car was not sufficiently manned at that time, of course you have a right to say so; but if you think, with me, that there were sufficient people there, that one man was sufficient, according to the ordinary practice of the company, and if you believe, as seems to be the case, that the conductor did his duty, then the whole thing turns on what was done after the conductor went off watch, and there you have this evidence, or want of evidence, if you choose. The man that could have told us that has not come here. The defendants intimate that they tried to get him, but he didn't come. If they had not shown that they tried to get him the inference would have been against them—that they did not want him here. I think that is fairly rebutted, but that he has not come is a matter for the jury to consider, as to why he did not come. He may not have taken this property, probably he did not, because the indications are that somebody else did—the men who got off under suspicious circumstances—but it would lie, according to the testimony, between those two men and the porter, and whether one or the other did it, if they did it the porter allowed them by his carelessness to do it, or he did it, the company would be liable. I presume there is no pretence, however, that the porter did it.

All of these matters are for the consideration of the jury, the possibilities and probabilities, and you have to take it altogether and render such verdict as you think proper, bearing in mind, of course, the one simple question, whether, at the time the robbery was committed, the employees of the company, this man in partic-

ular, who should have been watching, was doing his duty and whole duty. If you find for the plaintiff, the rule of law is that he should only recover for reasonable luggage, clothing, personal ornaments, and a sum of money such as would be ordinarily proper for travelling expenses. He had gone away from home to be gone a week or more, and I think the amount of money—some sixty odd dollars—would not seem to be at all unreasonable. I know I would want as much at least as that if I were going away (and did not intend to spend much) for a week or two; and I think anybody going on business with the expense incident to travel could not very safely leave with less than a hundred dollars or so. That, of course, is for the jury, not for me. He had a gold watch; it was a valuable one, but it would seem to be not of such exceptional value as to take it out of the ordinary rule. It had been worn about a year, which would somewhat impair its value as a merchantable article, for which there ought to be some deduction, and then he ought to have interest from the time of the robbery till the present time.

Of course, if you think the defendant company did its whole duty, that the watchmen were diligent and attentive, you ought to find for the defendant.

Verdict for plaintiff for \$317.80. To this charge defendant excepted, and assigned for error the part of the charge included in brackets, the admission in evidence of the conversation between plaintiff and the porter and the evidence of other losses on the same night.

W. W. Weir for the plaintiff in error.

F. W. McCook for the defendant in error.

MEROUR, C. J.—We have carefully examined the evidence and considered the assignments of error. Conceding that the company is not liable in this action as an inn-keeper or common carrier, yet a reasonable and proper degree of care is imposed on the company. Whether it did exercise that degree of care, under the circumstances, was for the jury. The main object in taking passage in such a car, is to permit the passenger to sleep. While in that helpless condition a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of a robbery by force and violence; but by stealthy larceny. Unless a watchman be kept constantly in view of the centre aisle of the car, larceny, from a sleeping passenger, may be committed without the thief being detected in the act. While the fact that another passenger in the same car was robbed the same night, was not relevant to prove that the defendant in error was, in fact, robbed, yet it was admissible as bearing on the absence of proper care by the company. This case was submitted to the jury

in an able and correct charge. We see no error of which the company can complain.

Judgment affirmed.

Liability of Sleeping Car Companies for Baggage and Valuables of Passengers.—The law is now settled to the effect that sleeping car companies are not liable as inn-keepers for the baggage of passengers, but that they are bound to provide such safeguards as prudence dictates in view of the particular circumstances. *Welch v. Pullman Palace Car Co.*, 18 Abb. P. R. (N. S.) 352; *Blum v. Pullman Palace Car Co.*, 3 Cent. L. J. 591; 3 Abb. L. J. 221; 1 Flippin's C. Ct. Reports, 500; *Palmer v. Wagner*, 11 Abb. L. J. 149; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *Woodruff, etc., Coach Co. v. Diehl*, 9 Am. & Eng. R. R. Cas. 294.

KNOWLTON

v.

MILWAUKEE CITY RY. CO.

(*Advance Case, Wisconsin. January 8, 1884.*)

The fact that a person injured on a street railway was travelling for pleasure on Sunday does not affect his right to recover.

The verdict in this case is not so excessive as to raise a presumption that the jury was actuated by prejudice or improper motives.

It being determined by the jury that the plaintiff had no time to descend from the step of the car, the refusal to instruct the jury as to a verdict in case he had time, was immaterial.

APPEAL from County Court, Milwaukee County.

The defendant is a corporation, and a carrier of passengers for hire, in the city of Milwaukee, in cars propelled by horses. In May, 1882, the plaintiff was a passenger in one of the cars, and when alighting therefrom was injured by the starting of the car. This happened on Sunday. This action is to recover damages for such injury. No question is raised on the pleadings. The issues tried were the negligence of the defendant, alleged by the plaintiff, and the contributory negligence of the plaintiff, alleged by the defendant, as the proximate cause of the injury complained of. The testimony, although in some respects conflicting, tends to show that the plaintiff, who had a diseased foot and leg, and walked only with crutches, wished to leave the car in which, with a friend, he had been riding, at the crossing of a certain street, and the driver stopped the car to enable him to do so. It was a closed car, with a door in the rear through which passengers passed to a platform and descended to the street on either side of the car. There was an iron railing in the rear of the platform. There were two tracks at that point, about three feet apart. This car was going west on the

north track. The plaintiff's lodgings were at a short distance south of the crossing. His friend stepped off the platform steps on the south side, and, just as the plaintiff was about to do so, his friend told him to wait until another car coming from the west and then near them should pass. About the same time the driver of the car going west signalled the driver of the other car to stop, and he did so when the heads of the horses attached to the two cars were about opposite each other. The plaintiff then started to leave the platform, and placed his crutches on the ground for that purpose, standing on the lower step leading from the platform to the street. He had hold of the iron railing with his left hand, and stood upon his well foot, his diseased foot not resting upon anything. When in this position, and about stepping to the ground, the driver with whom he had been riding started his car, and the plaintiff was thrown to the ground with considerable violence. He retained his hold upon the iron railing and was dragged to a point opposite the rear end of the other car, and thus received the injury complained of. There was a special verdict in the form of questions and answers as follows:

"(1) Was the plaintiff thrown down, at the time and place mentioned in the complaint, by reason, among other causes, of the defendant's car being started up by the driver while plaintiff was in the act of leaving the same? Yes. (2) Was the plaintiff, at the time the car so started up, holding on to the rail, standing on the step of said car, or on the ground near said step, holding on the rail? Standing on the step of said car. (3) Did the defendant stop the car for plaintiff to get off of the same, and did the plaintiff have time and opportunity to descend from said car to the ground before it started up? The defendant did stop the car, but the plaintiff did not have sufficient time to descend from said car before it started up. (4) Was the plaintiff in the exercise of ordinary care in getting off said car, and in attempting to descend from the same, at the time and place mentioned in the complaint? Yes. (5) Was the injury to the plaintiff in any manner attributable to the want of ordinary care on the part of the plaintiff, contributory thereto? No. (6) Was the injury complained of caused by any want of ordinary care on the part of the defendant or its servant, at the time and place mentioned in the complaint? Yes. (7) Do you find for the plaintiff or defendant? For the plaintiff. (8) If you find for the plaintiff, at what do you assess his damages? Four hundred dollars." Motion for a nonsuit and for a new trial were denied, and judgment was entered for the plaintiff pursuant to the verdict. The defendant company appeals from the judgment.

Austin & Runkel for respondent, Lewis R. Knowlton.

D. G. Rogers and E. P. Smith for appellant, Milwaukee City Ry. Co.

LYON, J.—Several questions of fact are involved in the determination of the issues of negligence made by the pleadings and evidence. The extent of the plaintiff's lameness as affecting his ability to move more or less rapidly; the speed with which the car coming from the west was moving; the nearness of the two tracks to each other, and whether the plaintiff might safely have stood between them had the cars passed each other; whether the plaintiff had reasonable opportunity to step behind the car in which he had been riding before the arrival of the other car; the proximity of the latter car when first discovered by the plaintiff; how suddenly the car which the plaintiff was leaving was started; the care exercised by the driver to ascertain whether the plaintiff was clear of the car; the imminence of the emergency in which the plaintiff was obliged to act; and perhaps other material facts, must necessarily be determined before the issues of negligence can be intelligently decided. Upon nearly all of these questions the testimony is conflicting. It would be idle to discuss the proposition that questions of negligence the solution of which depends upon the determination of so many disputed facts, are always for the jury. They were submitted to the jury in this case, and the jury found the driver of the defendant guilty of negligence which caused the injury complained of, and acquitted the plaintiff of any negligence contributing thereto. These findings are supported by abundant testimony. The right of the plaintiff to recover is not affected by the fact that he was travelling for pleasure on the Sabbath day. He did not thereby become an outlaw, but was as much within the protection of the law, and was entitled to the same degree of care by the defendant to protect him from injury, as though he had postponed his ride on the defendant's car until the following day. It was so held in *Sutton v. Wauwatosa*, 29 Wis. 21, and the rule was reasserted and emphasized in *McArthur v. G. B. & M. Canal Co.*, 34 Wis. 139. The rule rests upon sound principle, and this court has no disposition to disturb it.

We do not think the damages assessed herein are so large as to justify the interposition of this court. The testimony tends to show that by reason of the injury the plaintiff was disabled several weeks, and that he suffered much pain. We cannot say that an assessment of \$400 in such a case is so excessive as to raise a presumption that the jury were actuated by any prejudice, bias, or improper motive. Upon the testimony alone, therefore, we cannot disturb the judgment entered for the plaintiff pursuant to the verdict and findings of the jury. It remains to consider the rulings of the learned county judge, made during the progress of the trial, upon which errors are assigned.

1. A witness for plaintiff was allowed, against objection, to testify that when plaintiff reached his lodgings, immediately after his injury, he complained of pain in his hip. Probably the testimony

was competent. But, whether it was or not, the proof is practically undisputed that by being dragged on the ground after the car the plaintiff was injured in the hip to an extent that considerable pain in the injured limb would be almost inevitable. If the ruling was erroneous the defendant could not have been prejudiced by it.

2. The court refused to give the jury an instruction proposed on behalf of the defendant, as follows: "If the jury find from the evidence that the plaintiff stopped on the lower step of the outside rear platform of the car longer than was necessary for him to safely descend from the same to the street, then he cannot recover." The refusal to give this instruction is of no importance, because the question was specially submitted to the jury whether the plaintiff had sufficient time to descend from the car to the ground after the car was stopped and before it was again started, and the jury gave a negative answer to the question. It being thus determined that the plaintiff had not sufficient time to descend safely from the car, it cannot be a material error that the court refused to instruct the jury what legal result would have followed had they found that the plaintiff had sufficient time for that purpose.

3. The court refused to give the following instruction, which, omitting the words in italics, was asked by defendant, but gave it as modified by the insertion of these words: "If the jury find from the evidence that the plaintiff voluntarily placed himself in the position described by him—that is, with only one foot on the lower step, the other loose, his crutches on the ground, and his left hand on the back rail of the platform, and knew that the car might be liable to start at any moment, and had time to descend to the ground before the car did start, but neglected to do so, and, without negligence or want of ordinary care by the driver, was thrown to the ground by the sudden jerks of the car in starting—he cannot recover in this action. The proposed instruction is to the effect that the facts hypothetically stated therein (if true) constituted such negligence on the part of the plaintiff as would defeat the action. One of the facts thus stated, to wit, that the plaintiff "knew that the car might be liable to start any moment," has no testimony to support it. The plaintiff had the right to presume that the car was not liable to start any moment, but would remain standing a reasonable time to enable him to leave it in safety. Another fact thus stated, to wit, that he had time to descend to the ground before the car started has, as already observed, been negatived by the jury. Moreover, had the jury found that the plaintiff had time to disengage himself from the car before it started, it would by no means necessarily follow that he was negligent. The sudden emergency of the approaching car might, in the opinion of the jury, have justified him, considering his crippled condition, in stopping for a few moments on the lower step of the platform to determine the

course he might safely pursue. For the above reasons the instruction asked was properly refused. Modified instruction given states the law correctly, and would have stated it correctly had it been predicated upon other and different supposed facts. It amounts only to an instruction that if the defendant's driver was free from negligence there could be no recovery.

4. The court instructed the jury that, although they might find the plaintiff would have escaped injury had he let go his hold upon the car, yet he was not guilty of negligence if he, in the exercise of his judgment at the time, thought he would be less injured if he retained his hold. We think the instruction correct. We have discovered nothing in the testimony which would have justified the jury in finding the plaintiff negligent because he held to the railing instead of releasing his hold. Either course was perilous; and he had no time for deliberate choice. He might have chosen either, and it would be absurd and unjust to impute negligence to him because he did not choose the other.

5. The court was asked, on behalf of defendant, to submit several specific questions of fact to the jury. The court did submit the substance of these, but in fewer and more comprehensive questions, except perhaps, the jury were not required, in terms, to find what particular act or omission of the defendant's driver was negligent. The jury found, however, that he started the car before the plaintiff had sufficient time to alight therefrom. This was sufficient negligence to fix the liability of the defendant, and it is quite immaterial whether the driver was or was not negligent in any other particular. The court necessarily has a large discretion in fixing the terms and scope of specific questions to be submitted to a jury when a special verdict is demanded, but the questions must cover all controverted issues. The questions so submitted in this case certainly include all such issues, and we think were properly framed to secure the rights of both parties.

The foregoing observations are believed to cover all the material rulings of the trial court upon which errors are assigned, and which are relied upon to reverse the judgment. Our conclusion is that the record discloses no material error, and hence that the judgment of the county court should not be disturbed.

Judgment affirmed.

Sunday Laws.—In an action against common carriers for personal injuries, it is no defence that the injury occurred on Sunday, while the plaintiff was either travelling or engaged upon his ordinary occupation. *McArthur v. Green Bay Co.*, 24 Wisc. 189; *Sawyer v. Oakman*, 7 Blatch. C. Ct. 290; *Carroll v. Staten Island Co.*, 58 N. Y. 126; *Etchberry v. Levielle*, 2 Hilton, 40; *Mohoney v. Cook*, 26 Pa. St. 342; *Philadelphia Railroad v. Towboat Co.*, 28 How. 217; *Schmid v. Humphrey*, 48 Iowa, 652. But see contra, *Stanton v. Metropolitan, R. R. Co.*, 14 Allen, 485; *Feital v. Railroad*, 109 Mass. 398; *Smith v. Boston Railroad*, 120 Mass. 490; *Lyons v. Desotelle*, 124 Mass. 387; *Bucher v. Fitchburg R. Co.*, 6 Am. & Eng. R. R. Cas. 212; *Day v. Highland*

St. R. Co., 135 Mass. 113. See further, Sparhawk v. Union Pac. R. R. Co., 54 Pa. St. 401; Augusta Railroad v. Renz, 55 Ga. 126; State v. Balt. & Ohio R. Co., 15 W. Va. 362; Yenoski v. State, 5 Am. & Eng. R. R. Cas. 40; Phila. W. & B. R. Co. v. Lehman, 6 Am. & Eng. R. R. Cas. 194; Commonwealth v. Louisville, etc., R. Co., 6 Am. & Eng. R. R. Cas. 216; Gulf, C. & S. F. R. Co. v. Levy, 12 Am. & Eng. R. R. Cas. 96.

Excessive Damages.—Upon this point see Berg v. C. M. & St. P. R. Co., 2 Am. & Eng. R. R. Cas. 70; Delie v. Chicago & N. W. R. Co., 5 Am. & Eng. R. R. Cas. 264; Ohio, etc., R. Co. v. Collarn, 5 Am. & Eng. R. R. Cas. 554; Houston & T. C. R. Co. v. Shafer, 6 Am. & Eng. R. R. Cas. 421; Indianapolis, etc., R. Co. v. McLin, 8 Am. & Eng. R. R. Cas. 237; Pittsburgh, etc., R. Co. v. Spania, 8 Am. & Eng. R. R. Cas. 453; Houston & T. C. R. Co. v. Boehm, 9 Am. & Eng. R. R. Cas. 366; L. Erie & W. R. Co. v. Fixe, 11 Am. & Eng. R. R. Cas. 109; Wabash R. Co. v. McDaniels, 11 Am. & Eng. R. R. Cas. 158; Kansas Pac. R. Co. v. Peavy, 11 Am. & Eng. R. R. Cas. 260; Klutts v. St. L. etc., R. Co., 11 Am. & Eng. R. R. Cas. 637.

Passengers Alighting from Street Cars.—The conductor is bound to afford passengers a reasonable time to alight during which the car must be at a standstill. Poulin v. Broadway, etc., R. Co., 61 N. Y. 621; Crissly v. Hestonville, etc., R. Co., 75 Pa. St. 83; Chicago City R. R. Co. v. Mumford, 8 Am. & Eng. R. R. Cas. 312; Wardle v. New Orleans City R. R. Co., 13 Am. & Eng. R. R. Cas. 60. But see, Brown v. Congress and Baker Sta. Ry. Co., 8 Am. & Eng. R. R. Cas. 383.

BRYAN

v.

CHICAGO, ROCK ISLAND AND PACIFIC RY. CO.

(*Advance Case. April 25, 1884.*)

A passenger upon a railroad is entitled to recover damages from the company for insolent, abusive, and offensive words spoken to her by the conductor, unless the company can show justification or other defence. The burden is upon the defendant to establish such defence.

A preponderance, or "fair preponderance," of evidence means merely the greater weight of evidence, and not "testimony of such superior weight and convincing force as satisfies the mind of its truth."

APPEAL from Polk Circuit Court.

Action by a passenger upon a train running on defendant's railroad for injuries sustained from insolent, abusive, and offensive words spoken to her by the conductor. There was a judgment upon a verdict for defendant. Plaintiff appeals.

Baylies & Baylies for appellant.

Wright, Cummins & Wright for appellee.

BECK, J.—The questions which we find to be decisive of the case arise upon instructions to the jury. It is therefore not necessary to recite the pleadings or to state the evidence further than is

required for a proper understanding of the points ruled in this opinion. In the charge to the jury, preliminary to the instruction, the circuit court stated quite fully the substance of the allegations of the petition, and then informs the jury that the defendant denied in its answer all averments of the petition. Thereupon the jury were directed in these words: "For a more precise and exact statement of the allegations of the parties and the issues in the case, see the pleadings themselves." This language must be understood as an admission that the issues were not precisely and accurately stated by the court, and a direction to the jury to determine for themselves from the pleadings the issues in the case. Indeed, the court did not attempt to state the issues in the case, but simply recited the allegations of the pleadings, which is quite a different thing. The issues are determined from the allegations, and the court could not require the jury to do this; that duty rested upon the court. The instruction is clearly erroneous. See *Fitzgerald v. McCarty*, 55 Iowa, 702, and cases cited.

The jury were directed that the burden rested upon plaintiff to establish the allegations of the petition by a preponderance of evidence, and in another instruction they were informed that she was required to prove her allegations "by a fair preponderance of evidence." The court then informs the jury that "by the term 'preponderance of evidence' is meant testimony of such superior weight and convincing force as satisfies the mind of its truth." This definition is clearly erroneous and misleading. The term simply means the greater weight of evidence. And, when a jury are informed that their verdict should accord with "the preponderance of evidence," they are simply directed that they should find for the party, upon any issue in the case, who adduces thereon the greatest quantity of credible evidence, as weighed in their own minds. In weighing evidence, if any should not be entitled to belief, it should be cast out of the balance. Doubtful and uncertain evidence should be weighed for just what it is worth. When evidence is weighed according to the rules of the law, the preponderance is with that side in whose favor the scales of reason turn. The language used by the court conveys no idea connected with the quantity of evidence which would be regarded as a preponderance, but rather relates to the effect of evidence. There may be evidence upon each side of an issue "of such superior weight and convincing force as to satisfy the mind of its truth." It is the duty of the jury to weigh this conflicting and equally credible evidence and find for that side whereon the weight preponderates.

The language of the court is capable of being understood as conveying the thought that the preponderance of evidence is found only where the mind is fully convinced of the truth of the testimony which controls the decision. This is incorrect. In civil cases a fact may be found in accord with the preponderance of the

evidence, and yet the mind may be left in doubt as to the very truth. The triers of an issue in such cases should, when doubts arise, find for the side whereon the doubts have less weight.

Counsel for plaintiff object to the term used in the instruction, "the fair preponderance of evidence," on the ground that it expresses something more than an absolute preponderance. We think the expression is unobjectionable. The adjective "fair" in the connection means "characterized by honesty, impartiality, upright, free from suspicion of bias," and is properly used in qualifying the word preponderance.

The court directed the jury that plaintiff was required to prove that the conductor, "without reasonable cause or provocation on the part of the plaintiff, was guilty of the misconduct towards plaintiff charged in the petition." If there existed a "reasonable cause or provocation" for the acts of the conductor, which relieved defendant of responsibility, it is in the nature of a defence, and the burden rested upon defendant to prove it. Plaintiff was not required to prove that defendant had no such defence. The case is not subject to the rule which would prevail when an action is brought upon a contract for transportation where a passenger is ejected from the cars. In that case he should show that he had done no act justifying the defendant in refusing to carry him. Nor is the case based upon negligence, when the plaintiff is required to show that he did not contribute to the injury. But it is for a positive wrong done for which she may recover, unless defendant shows justification or other defence. The burden rests upon defendant to establish such defence, and not upon plaintiff to prove that it did not exist.

Other questions discussed by counsel need not be considered.

The judgment of the circuit court, for the errors pointed out, must be reversed.

See *Louisville & Nashville R. R. Co. v. Kelley*, and note, 13 Am. & Eng. R. R. Cas. 1; *International & Great Northern R. Co. v. Kentle*, *infra*.

INTERNATIONAL AND GREAT NORTHERN R. R. Co.

v.

KENTLE.

(*Advance Case, Texas. October 26, 1888.*)

An answer may embrace inconsistent defences. Each separate defence, however, which is set up in the answer; each plea in confession and avoidance, must constitute in itself a good defence to the action and be consistent in its averments. But distinct defences, set up in separate pleas in the answer, may be inconsistent with each other without invalidating the answer.

Where the cause was tried upon the facts by the judge, and he struck out the special defences of the defendant, but admitted evidence of those special defences under the general denial. *Held*, that the special defences were legal defences properly pleaded, and it was error to strike them out.

It is settled law that "unwarrantable assaults on passengers by the carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier."

In estimating compensatory damages in this class of actions the jury may take into consideration as elements of damage, loss of time, inability to attend to business, pecuniary expenses, bodily pain, any incurable hurt, personal inconvenience, and mental anguish caused by bodily pain.

The character of the passenger cannot be considered in estimating the amount of the damages.

Duncan for appellee.

Bonner for appellant.

WHITE, P. J.—Suit brought by appellee, Henry Kentle, against appellant, the International & Great Northern R. R. Co., in the county court of Gregg county, for \$500 actual damages for alleged wrongful and forcible ejection of plaintiff from the train of defendant by the conductor.

Defendant answered by general and special demurrer, general denial and special pleas, including pleas of justification.

Plaintiff's amended original petition cures defects raised by defendant's special demurrer. Plaintiff's general demurrer was sustained to defendant's special pleas, and the latter refusing to amend final judgment was, on the trial, rendered for plaintiff for \$500, the amount claimed and costs, from which this appeal is prosecuted.

After pleading a general denial defendant further answered specially, in substance that if the conductor in charge of its train did the matters and things complained of in the petition, then that said conductor acted without the authority or consent of defendant, and beyond the scope of his authority as agent of defendant; and further, that if plaintiff was ejected from defendant's train and injured, defendant was justified for the act of its agent in so ejecting him by the outrageous conduct of the plaintiff while on the train, and his refusal to get off the cars at the station to which he was going, and remaining upon the platform of the train, cursing and abusing the conductor and preventing him from pursuing his journey with his train.

Plaintiff's general demurrer to this answer was sustained by the court, and the answer was stricken out. We infer that this action of the court in sustaining the demurrer and striking out the answer was based upon the ground that the answer was inconsistent in its allegations, and therefore could not be permitted to stand as a legal valid pleading. That this was the view of the matter as taken by the court is also apparent, from the brief of

counsel on file here. And in support of the correctness of the ruling we are referred by appellee to the case of *Hillebrant v. Booth*, 7 Tex. 499.

We misconceive entirely the tenor of that decision if it is authority in the premises; on the contrary it distinctly announces the doctrine that the answer may embrace inconsistent defences. It is true that each separate defence, or "plea in confession and avoidance, must constitute in itself a good defence to the action, and of consequence be consistent in its averments," and also that "if the averments in any one of the pleas be inconsistent, and thus contradict and falsify themselves, they cannot be susceptible of proof, and of consequence must be invalid." But this rule is not applicable to separate pleas, or distinct defences, considered with reference to each other. These may be inconsistent with each other and not invalidate, or affect, the legality of the answer.

The principle cannot be better exemplified than in the case before us. Two pleas are interposed by defendant:

First, that it is not bound, because the conductor, at the time, was acting beyond the scope of his authority as its agent. This is certainly a good plea and good defence, if true, and it is not inconsistent in its averments.

The second plea is that defendant was justified for the acts of the conductor by the acts and conduct of the plaintiff, which brought them about. This plea is also good, and consistent with itself, though it may appear to be inconsistent with the first plea, or defence.

It was manifestly error for the court to sustain the demurrer to the answer, because the defences pleaded were supposed to be, or were, in fact, inconsistent with each other.

"The defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence, and which may be pertinent to the cause." R. S. Art. 1262.

But it is insisted by appellee that though the court may have erred in striking out these special defences, yet appellant should not be heard to complain, because under the general denial the same evidence was admissible which could have been introduced under these defences, and that it was in fact admitted, without objection, on the trial. It is unnecessary to determine how far, as a general rule, this proposition would be correct. In this particular case, however, we do not think it would hold good. The case was tried by the judge without the intervention of a jury. In passing upon the general demurrer he had already held that these pleas were insufficient; that they presented no valid defences to the action, and that, being inconsistent, they were not maintainable for any purpose. Such being the case it appears to us that

he stood in the position of having prejudged the effect of the evidence before its introduction, and that, though introduced properly, perhaps, under the general issue, it could scarcely have affected his opinion upon its merits—an opinion already formed, fixed, and judicially expressed by his rulings.

In a word, it is impossible to tell how far the determination and ruling of the judge upon the sufficiency of the special pleas may have influenced and involved his judgment upon the facts stated in those pleas. The answer itself as a pleading was unquestionably good on general demurrer.

In giving his conclusions upon the law and facts of the case the learned judge says: "I find that the conductor of said train did forcibly eject said plaintiff from said cars; that the said conductor, J. C. Gregory, did use more force than was necessary in such ejection, inflicting wounds and injuries upon the person of said plaintiff.

"I find upon the law that for this unlawful act of said J. C. Gregory, conductor of said train, the said I. & G. N. R. R. Co. is liable in damages for the wounds and injuries inflicted upon the person of the said Henry Kentle, plaintiff, as well as the injury to his feelings and character for the indignity placed upon him by the unlawful act of said J. C. Gregory, conductor of said train."

It is settled law that "unwarrantable assaults upon passengers by the carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier. The principles of law applicable to the relations of master and servant do not fully define the rights, duties, and obligations between carriers and their passenger. They are not merely citizens, bearing only towards each other the relation which one citizen bears to another. The carrier agrees to carry for hire, the passenger from one place to another, and is responsible for any breach of the obligation thus assumed, in ill usage of the passenger by himself or employee. Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owner to use due care and exertion to protect them from any degree of violence, abuse, or ill treatment from other passengers, or the carrier's servants, or other persons coming on board during the trip. The principal in this class of cases is liable for the misconduct of the employee when it occasions injury to the passenger, whether arising from malice or neglect." *Pendleton v. Kinsley*, 3 Clifford, 416; *Thompson's Carriers of Passengers*, p. 352, and Notes pp. 363 et seq.

When a carrier becomes liable in damages for a wrong or injury done to a passenger, the same rules as to the measure of damages apply to corporations as to individuals.

"In estimating compensatory damages in this class of actions the jury may take into consideration as elements loss of time,

inability to attend to business, pecuniary expenses, bodily pain, any incurable hurt (as where mental faculties are impaired), personal inconvenience, and mental anguish caused by bodily pain." Thompson on Carriers of Passengers, pp. 570, 571.

"But it is said that the character of the passenger cannot be considered as an element in estimating the amount of damages." Thompson on Carriers of Passengers, 572; citing *Lincoln v. Saratoga, etc., R. R. Co.*, 23 Wend., 425; *New Orleans etc. R. R. Co. v. Albritton*, 38 Miss. 242; *The Oriflamme*, 3 Sawyer, 397; s. c., 2 Cent. L. J. 473.

In the case before us the only measure of actual damages shown with any certainty was by the testimony of the plaintiff himself, that he was so injured that he was laid up, unable to work, for two weeks, and that his services were worth during that time \$3 per day. As claimed in the petition, the damages were laid at \$500, and the court gave judgment for the full amount claimed. In his findings, or rather in his conclusions of the law upon the facts found, we have seen that the county judge took into consideration as an element of the damages, injury to his "character for the indignity placed upon him."

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Liability of Company for Assault by Servant on Passenger.—See for a full discussion of this subject *Louisville & Nashville R. R. Co. v. Kelley*, 13 Am. & Eng. R. R. Cas. 1. See also *Bryan v. Chicago, R. I. & P. R. Co.*, supra.

Damages for Personal Injuries.—As to the measure of damages in cases of personal injuries see the following authorities. *Pennsylvania Co. v. Ray*, 1 Am. & Eng. R. R. Cas. 225; *Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. R. Cas. 44; *Berg v. C., M. & St. P. R. Co.*, 2 Am. & Eng. R. R. Cas. 70; *Delie v. Chicago & N. W. R. R. Co.*, 5 Am. & Eng. R. R. Cas. 464; *Houston, etc., R. R. Co. v. Willie*, 5 Am. & Eng. R. R. Cas. 541; *Rains v. St. Louis, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 610; *Louisville, etc., R. R. Co. v. Wolfe*, 5 Am. & Eng. R. R. Cas. 554; *Houston & T. C. R. Co. v. Shafer*, 6 Am. & Eng. R. R. Cas. 421; *Batterson v. Chicago, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 123; *Reed v. Chicago, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 180; *St. Louis, etc., R. Co. v. Cantrell*, 8 Am. & Eng. R. R. Cas. 198; *Indianapolis, etc., R. Co. v. McLin*, 8 Am. & Eng. R. R. Cas. 237; *Morse v. Duncan*, 8 Am. & Eng. R. R. Cas. 374; *Pittsburgh, etc., R. Co. v. Spania*, 8 Am. & Eng. R. R. Cas. 453; *Houston, etc., R. Co. v. Nichols*, 9 Am. & Eng. R. R. Cas. 361; *Houston & T. C. R. Co. v. Boehm*, 9 Am. & Eng. R. R. Cas. 366; *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 369; *Houston & T. C. R. Co. v. Rand*, 9 Am. & Eng. R. R. Cas. 399; *Houston & T. C. R. Co. v. Leslie*, 9 Am. & Eng. R. R. Cas. 407; *Lake Erie & W. R. Co. v. Fixe*, 11 Am. & Eng. R. R. Cas. 109; *Dawson v. L. & N. R. Co.*, 11 Am. & Eng. R. R. Cas. 134; *Wabash R. Co. v. McDaniels*, 11 Am. & Eng. R. R. Cas. 158; *Missouri Pac. R. Co. v. Lyde*, 11 Am. & Eng. R. R. Cas. 188; *Kansas Pac. R. Co. v. Peavy*, 11 Am. & Eng. R. R. Cas. 260; *Klutts v. St. L., I. Mt. & S. R. Co.*, 11 Am. & Eng. R. R. Cas. 639; *Reed v. Chicago, R. I. & P. R. Co.*, 12 Am. & Eng. R. R. Cas. 107.

ELY

v.

ST. LOUIS, KANSAS CITY AND NORTHERN RY. CO.

(77 Missouri Reports, 34.)

It is a fatal error to submit to the jury by instruction a case not made in the pleadings. Hence, where the petition in an action against a railroad company for personal injuries alleged as the ground of plaintiff's claim, negligence on the part of the company in running its train over a portion of its track which had been undermined and rendered dangerous by a flood of water; and the court upon the trial gave an instruction which permitted a recovery for defects in the road-bed or in the ties or materials used on the road. *Held*, that the judgment must be reversed.

In an action against a railroad company for injuries sustained by a passenger in an accident caused by an embankment on the company's road being undermined by a rain-storm of unprecedented violence, it appearing that since the accident the embankment had been so altered as to provide against a recurrence of such storms, the company asked, but the trial court refused, an instruction that the jury were not to take this fact into consideration. *Held*, that this was error,

APPEAL from Livingston Circuit Court.

Chas. A Winslow with Wells H. Blodgett and Prosser Ray for appellant.

Hale & Son for respondent.

NORTON, J.—This is an action for personal injuries to Josephine Ely, commenced in the circuit court of Carroll county, and moved by change of venue to Livingston, where upon a trial of the cause plaintiffs obtained judgment, from which defendant has appealed.

Omitting the formal parts of the petition, after alleging that said Josephine Ely was a passenger on defendant's train, it avers as the cause of action the following: That at a point in Chariton county on defendant's road near Salisbury, there had been, on the evening of September 5th, aforesaid, a flood in the water courses along the line of said road, which had undermined and weakened the road-bed, bridges and culverts on said road, whereby the same was rendered unsafe and dangerous for the passage of trains; that notwithstanding the condition of said road, defendant, by its servants, agents and employees, negligently and carelessly attempted to run the train, on which said Josephine had taken passage, over that part of said road which had been so rendered unsafe and dangerous; and when said train reached that part of said road, by reason of said injury to the track, culverts and bridges aforesaid, and the negligence and carelessness of defendant as aforesaid, and the giving away of the embankments, culverts and bridges as aforesaid,

said train was thrown from the track, overturned and demolished, including the car in which said Josephine was riding; and that said Josephine was thereby, and by reason of the facts and acts aforesaid, greatly wounded, bruised and injured, and suffered severe pain in body and mind, and was made and is sick and sore and suffered severely, and has sustained lasting and permanent injury, for which damages in the sum of \$20,000 is asked.

Among other errors assigned by defendant is the action of the court in giving the following instruction: 4. It was the duty of the defendant to provide a road adapted to the safe passage of the trains over it; and if the jury believe from the evidence that there was any defect in the construction of the road-bed, or in the character of the ties or other material then in use on said road, which defect might have been discovered by the exercise of the care, caution, prudence, skill and foresight indicated in the first instruction, and which alleged defect contributed in whole or in part to the alleged accident, and the plaintiff was injured thereby, then they will find for the plaintiff.

This instruction is excepted to on the ground that it authorized the jury to find a verdict on a cause of action not stated in the petition, and we are of the opinion that the exception is well taken. It will be observed that after the declaration of a correct abstract principle, viz.: "that it was the duty of defendant to provide a road adapted to the safe passage of trains over it," the instruction predicates a right of recovery on a case not made by the petition, in this, that it tells the jury to find for plaintiff if they believed there was any defect in the construction of the road-bed or in the character of the ties or other materials then in use on said road, which defect contributed in whole or in part to the accident and injury to plaintiff. No such case as is made by the instruction is made in the petition. The cause of action stated in the petition is not for any defect in the construction of the road-bed, nor in the ties or materials used on said road, but the injury for which plaintiffs sue is alleged to have been occasioned by the negligence of defendant's servants in running its train over the road at a point near Salisbury, where, it is averred, it had been rendered dangerous and unsafe by a flood of water, which, on the night of the accident, had undermined and weakened the road-bed, bridges and culverts. Plaintiffs, in their petition, base their right to recover for negligence in running its trains over a portion of the road rendered dangerous by reason of having been undermined by a flood of water, while the instruction authorizes a recovery for an injury arising out of defective construction or defective ties or materials used on said road, and under the rulings of this court in the cases of *Waldhier v. Hannibal & St. Jo. R. R. Co.*, 71 Mo. 514; *Price v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 414; *Edens v. Hannibal & St. Jo. R. R. Co.*, 72 Mo. 212, and *Bullene v. Smith*, 73 Mo. 151, it is reversible

error to submit to the jury by an instruction a case not made in the petition.

It is also insisted that the court erred in refusing the following instruction on the part of defendant: 12. It was the duty of the defendant, after the rain-storm which occasioned the disaster at its embankment near Salisbury in September, 1876, to so change or alter said embankment as to provide against a recurrence of similar storms; and if it appears from the testimony that defendant caused said embankment to be altered or changed for such purpose, such testimony should not be taken into consideration in this case by the jury in determining whether said embankment was properly constructed and sufficient to withstand and turn back, and had withstood and turned back, all floods that had occurred since the construction of the road, or that might reasonably, within the experience of those living in that locality, be expected to occur.

It appears from the evidence in this case that the rain-storm on the night of the disaster was wholly unprecedented in violence and the quantity of water which fell during its continuance, and was on that account of such a character that defendant in the construction of its road-bed was not required to anticipate or provide against it, and if after the occurrence defendant, out of abundant caution, altered its road-bed so as to provide against injury from the recurrence of such a storm, which might or not again occur, such fact was not a proper one to be taken into consideration by the jury, in determining the question whether the embankment at the point of the accident was sufficient to withstand and turn back all floods that had occurred since its construction, or that might reasonably, within the experience of those living in that locality, be expected to occur. We are of the opinion that the instruction should have been given, since evidence was received to the effect "that after the accident a new pile bridge had been built where the old one was."

It is also insisted that the court erred in submitting the question of negligence to the jury because there was no evidence of it. The case of *Ellet v. St. Louis, K. C. & N. Ry. Co.*, 12 Am. & Eng. R. R. Cas. 183, was a suit for the recovery of damages occasioned by the same accident, and the evidence, which is clearly and accurately set forth in the opinion, is substantially the same as in the case now before us, and the identical question here presented was there considered, and it was held that no error was committed in that respect. Judge Hough, speaking for the court: "If the engineer had reason to believe that the water had been higher than it was when he reached the pond, or that it had remained at the height at which he saw it, long enough to soften the earth upon which the ties rested, which, according to the testimony of the experts, would have been an hour or an hour and a half, then although the ties were in place and the rails in line, it would have been his duty to have inspected

or tested the track before venturing over it with his train. On the other hand, if the engineer had no reason to believe that the water had been higher than he saw it, or that it had remained where it was long enough to soften the earth under the ties, and he saw the ties in place and rails in line, then, according to the testimony of all the experts, he was not guilty of negligence in attempting to take his train over the embankment. This is a question of fact for the jury."

The case in all other respects, except those above noted, seems to have been well tried, but for the errors herein pointed out the judgment will be reversed and the cause remanded, in which all concur, except Ray, J., not sitting.

Alterations after Accident—Additional Safeguards.—According to some authorities the making of alterations in the agency which it is alleged has caused the accident after the same has occurred, or the taking of additional precautions in such case to prevent its recurrence, are not admissible as evidence of negligence. *Salters v. Delaware & H. C. Co.*, 3 Hun, 338; *Payne v. Troy & B. R. Co.*, 9 Hun, 526; *Dougan v. Lake Champlain Trans. Co.*, 56 N. Y. 1; *Dale v. Delaware, Lackawanna & Western R. R. Co.*, 73 N. Y. 468; *Hudson v. Chicago & N. R. Co.*, 8 Am. & Eng. R. R. Cas. 464.

But according to other authorities such evidence is admissible. *Westfall v. Erie R. Co.*, 5 Hun, 75; *Hawley v. N. Y. Central & H. R. R. Co.*, 19 Hun, 556; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kans. 47; *Kansas Pac. R. Co. v. Miller*, 2 Cal. 442; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311.

BROOKS

v.

BOSTON AND MAINE R. R.

(135 *Massachusetts Reports*, 21.)

In an action by a woman against a railroad corporation for personal injuries occasioned to her while a passenger on defendant's train, it appeared that, when the train reached her destination, the conductor called the name of the station, the train stopped, and several passengers got out at once without unusual delay, among them the plaintiff, who followed close after the person in front of her; and that, when she got off, the train had started and was moving, by reason of which she fell, and received the injuries complained of. The plaintiff testified that she looked when she was stepping off, but that it was so dark she could not see the platform; and that she did not look to see whether the train was moving because she felt sure it was still; and there was also evidence that there was no object which any one could see from which it could be determined whether the train was moving or not. It did not appear that there was any warning which the plaintiff could have heard that the train was about to start. *Held*, that the question whether the plaintiff was in the exercise of due care should have been submitted to the jury.

TORT for personal injuries. Trial in the Superior Court, before Mason, J., who ruled that the action could not be maintained, and

directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

A. B. Coffin for the plaintiff.

S. Lincoln for the defendant.

HOLMES, J.—The plaintiff was a passenger on the defendant's train. The train reached Melrose, the plaintiff's destination, the conductor called the name of the station, the train stopped, and several passengers got out at once without unusual delay, among them the plaintiff, who followed close after the person ahead of her. When she got off, the train had started and was moving, by reason of which she fell and hurt her spine. The only question is whether the case was properly taken from the jury, on the ground that the plaintiff was negligent. There was evidence tending to show that the train started quietly, and had only moved a short distance, so that the plaintiff might not have felt the motion, and that in fact she did not know that the train had started. Therefore, the cases in which it has been held negligence to get off a train known to be in motion do not dispose of the matter. *Gavett v. Manchester & Lawrence R. R.*, 16 Gray, 501, 506. *Harvey v. Eastern R. R.*, 116 Mass. 269. The question is whether she ought to have known. She testified that she looked when she was stepping off, but that it was so dark that she could not see the platform, and that she did not look to see whether the train was moving because she felt sure it was still. There seems to have been no warning, which she could have heard, that the train was about to start; and, if this were all the evidence, it might well be asked whether, when the train stopped for that purpose, she had not a right to get off at her place of destination as soon as she could, following the other passengers, without further inquiry or examination, unless she actually knew the train had started. *Brassell v. New York Central & Hudson River R. R.*, 84 N. Y. 241, 246; s. c., 3 Am. & Eng. R. R. Cas. 380. But in this case there was the further testimony that there was no object which any one could see from which it could be found out whether the train was moving or not. If this statement was believed, in addition to the other elements of the plaintiff's story, she did all that could be required, on the strictest possible view of her duty.

Exceptions sustained.

Company must give Passengers Reasonable Time in which to Alight.—It is the duty of a railroad company to afford its passengers a reasonable time to get on and off the train at stations where it has stopped. *Curtis v. Detroit, etc., R. Co.*, 23 Wisc. 152; s. c., 27 Wisc. 158; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Imhoff v. Chicago, etc., R. Co.*, 20 Wisc. 344; *New Orleans, etc., R. Co. v. Statham*, 42 Miss. 607; *Dickens v. New York, etc., R. Co.*, 28 Barb. 41; *Keller v. New York, etc., R. Co.*, 17 How. Pr. 102; *Wabash, etc., R. Co. v. Rector*, 9 Am. & Eng. R. R. Cas. 264; *Dawson v. Louisville & N. R. Co.*, 11 Am. & Eng. R. R. Cas. 184; *Strauss v. Kansas*

City R. Co., 6 Am. & Eng. R. R. Cas. 384; St. Louis, etc., R. Co. v. Cantrell, 8 Am. & Eng. R. R. Cas. 198; Swigert v. Hannibal, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 322.

Duty to give Signal at Starting.—It must also give reasonable warning of the starting of the train. Doss v. Missouri, etc., R. Co., 59 Mo. 27; Keating v. New York, etc., R. Co., 49 N. Y. 678; Mitchell v. Western, etc., R. Co., 80 Ga. 22.

Passengers Must not Alight after Train has Started.—A passenger is not ordinarily justified in any event in jumping from a moving train. Such conduct is ordinarily construed to amount to contributory negligence. Morrison v. Erie R. Co., 56 N. Y. 302; Burrows v. Erie R. Co., 68 N. Y. 556; Jeffersonville, etc., R. Co. v. Hendricks' Administrator, 26 Ind. 288; Railroad Co. v. Aspell, 28 Pa. St. 147; Damont v. New Orleans, etc., R. Co., 9 La. Ann. 441; Dougherty v. Chicago, etc., R. Co., 86 Ill. 467; Lucas v. New Bedford, etc., R. Co., 6 Gray, 64; Gavett v. Manchester, etc., R. Co., 16 Gray, 501; Atchison, etc., R. Co. v. Flynn, 1 Am. & Eng. R. R. Cas. 240; Price v. St. Louis, K. C. & N. R. R. Co., 3 Am. & Eng. R. R. Cas. 365; Treat v. Boston & L. R. R. Co., 3 Am. & Eng. R. R. Cas. 423; Lake Shore & Mich. S. R. Co. v. Bangs, 3 Am. & Eng. R. R. Cas. 426; Jewell v. Chicago, etc., R. Co., 6 Am. & Eng. R. R. Cas., 879; Wabash, etc., R. Co. v. Rector, 9 Am. & Eng. R. R. Cas. 264; Houston, etc., R. R. Co. v. Leslie, 9 Am. & Eng. R. R. Cas. 407; Central R. R. & B. Co. v. Letcher, 12 Am. & Eng. R. R. Cas. 115; Edgar and wife v. Northern Ry. Co. and note, *infra*.

But see Chicago, etc., R. Co. v. Bonifield, 8 Am. & Eng. R. R. Cas. 493; Swigert v. Hannibal, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 322.

EDGAR AND WIFE

v.

NORTHERN RY. CO.

(4 Ontario Reports, 201.)

The plaintiffs, husband and wife, were on a train of the defendants, going to Lefroy. The conductor, before reaching the station, announced that the next station was Lefroy. On approaching the station the train, according to the plaintiff's witnesses, was slowed, but did not stop. The husband got off while the train was moving slowly, and his wife, seeing that the speed was increasing, and that they were passing the station, sprang after him, though he had let go of her hand, and told her not to jump, and was injured. It was left to the jury to say whether she had acted imprudently in so doing, and they found a verdict for the plaintiffs.

Held, that the question of contributory negligence was properly left to them, and the Court refused to disturb the verdict.

THIS was an action to recover damages for injuries sustained by the female plaintiff in jumping off the defendants' car at a station called Lefroy, on the defendants' line of railway, whilst train was in motion.

The case was tried at the last Barrie Assizes, before Cameron, J.,

and a jury, and resulted in a verdict in favor of the husband for \$200, and for the wife of \$100.

The facts were shortly as follows: The plaintiffs were travelling as passengers on the defendants' railway from Toronto to Lefroy. After the train had left the station (Gilford) next to Lefroy, the conductor passed through the car and called out that the next station would be Lefroy. According to the plaintiffs' witnesses, upon coming to Lefroy the train slowed up, and several passengers got out, including the husband, who attempted to help his wife off, but the train being in motion, he let go of her hand, and called out to her not to jump. She, however, as she stated in her evidence, seeing that the speed of the train was increasing and it was passing the station, took the risk of jumping off the platform of the car, and in so doing was injured. The accident occurred at night, which the evidence showed was very dark.

The judge charged strongly in favor of the defendants.

During Michaelmas Sittings an order nisi was granted to show cause why the verdict and judgment thereon in favor of the plaintiffs should not be set aside, and a nonsuit entered, or for a new trial, on the ground that the verdict and judgment were contrary to law and evidence, and the judge's charge; and, in the event of a new trial being granted, that the jury notice should be struck out.

Boulton, Q. C., supported the order nisi, contending there was contributory negligence on the female plaintiff's part in jumping off, which disentitled her to recover, referring to *Lewis v. London, Chatham, and Dover R. W. Co.*, L. R. 9 Q. B. 66; *Siner v. Great Western R. W. Co.*, L. R. 3 Ex. 150, 4 Ex. 117; *Davey v. London and South Western R. W. Co.*, L. R. 11 Q. B. D. 213.

Osler, Q. C., contra, argued that the defendants invited the plaintiffs to get off by calling out the station, and then slowing the train, referring to *Slattery v. Dublin & Wicklow R. W. Co.*, L. R. 3 App. Cas. 1155.

HAGARTY, C. J.—The defendants in moving against the verdict relied chiefly on the cases of *Siner v. Great Western Ry. Co.*, L. R., 3 Ex. 150, and in error 4 Ex. 117 (about 1868-9), and *Lewis v. London, Chatham, and Dover, R. W. Co.*, L. R. 9 Q. B. 66, decided in 1873, in which cases the majority of the judges decided the question of negligence or no negligence as matter of law. The former case was one in which the passenger got out when the train had overshot the platform.

Lewis v. London, Chatham, and Dover R. W. Co., was a case in which the plaintiff tried to get out beyond the platform, and as she stepped the train backed to come back to the platform, and the jerk threw her to the ground.

I would especially call attention to the clear and vigorous language of Kelly, C. B., in *Siner v. Great Western R. W. Co.*, 3 Ex.,

who was against the nonsuit with Keating, J. He very fitly describes the duty of the company as to providing proper means for passengers to alight, and that must be a question for the jury whether the plaintiff was or was not guilty of unreasonable want of caution in striving to get out at the risk of being carried past.

In *Robson v. North Eastern R. W. Co.*, L. R. 2 Q. B. D. 86, the plaintiff recovered, and Lord Coleridge notices that *Siner's* case is commented on and distinguished in *Bridges v. North London R. W. Co.*, in Ex. Ch. L. R. 1 Q. B. 377, and in House of Lords, L. R. 7 H. L. 213.

The last case is the highest and fullest authority on the question of what is proper evidence to be left to the jury. There is a very full review of the authorities, and the opinions of the judges were called for and given.

I especially refer to the very lucid judgment of Brett, L. J. The Lords decided that the case must be left to the jury.

In the case already cited, of *Robson v. North Eastern Ry. Co.*, Brett, L. J., says, in reference to *Bridge's* case: "The House of Lords held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner v. Great Western R. W. Co.*, was decided in the heat of the controversy, and without saying that it ought to be overruled, I may say that it was decided by judges who thought that these cases ought to be left to the judge and not to the jury.

. . . . It appears to me that the judgment of the House of Lords in *Bridges v. North London Ry. Co.*, puts an end to a long controversy, not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should as much as possible be withdrawn from the jury, and that the Court ought to say what was reasonable for the passenger to do."

The authorities are so fully noticed in these cases that their names need not be repeated.

We may also refer to *Cameron v. Milloy*, 14 C. P. 345, and the judgment of Wilson, C. J.

In the case before us I think a *prima facie* case of negligence was established. The conductor called out that Lefroy was the next station. The train, in place of coming, as it should have done, to a full stop, apparently (though not very clearly shown) was only slowed. The plaintiff and several others anxious to alight crowded to the door and steps of their car. Several got out on the platform, and the plaintiff followed her husband, and, most anxious to reach her home, sprang out, the train being in motion.

It was properly left to the jury to say whether she had acted with reasonable prudence in so doing, and whether (in substance) by her imprudence she wholly brought the injury and loss on herself.

As Kelly, C. B., said: "I am clearly of opinion that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could be lawfully called on to choose, namely, either to go on to Bangor, or to take his chance of danger and jump out; and if they do so, the choice is made at their peril." *Siner v. Great Western Ry. Co.*, L. R. 3 Ex., at p. 136.

Had the jury here found that plaintiff had acted with unreasonable imprudence and found for the defendants, I should not question their verdict.

They have found otherwise, and I cannot say they are wrong.

On no point should a railway company be more careful than in a matter of this kind. On a dark night they announce the name of the next station, knowing that they had passengers for that station, and then either not fully or completely stopped the train, so as either to give a safe means of exit, or to take care to warn passengers that they had determined to break their contract by not stopping at all.

The latest case on this much debated question is *Davey v. London and South Western R. W. Co.*, 11 Q. B. D. 213, decided a few months ago. The plaintiff must show a prima facie case of negligence causing the injury. But if he show that himself caused the injury by his own conduct, which was the sole cause of the accident, and not any negligence on defendants' part, he cannot recover, and may be nonsuited.

The last number of the "Weekly Notes," for December 8th, p. 201, mentions the affirmance of this judgment by the Master of the Rolls, and Bowen, L. J., Baggallay, L. J., dissenting.

Armour and Cameron, JJ., concurred.

Order nisi discharged.

Obligation of Railroad Company to Stop Trains Long Enough to allow Passengers to Alight.—It is the duty of a railroad company to stop a reasonable time so as to give the passengers an opportunity of alighting. *Penna. R. R. Co. v. Kilgore*, 32 Pa. St. 293; *Fairmount & Arch St. Pass R. Co. v. Stutler*, 54 Pa. St. 375; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 233; *Toledo, etc., R. R. Co. v. Baddeley*, 54 Ill. 19; *St. Louis, etc. R. Co. v. Cantrell*, 8 Am. & Eng. R. R. Cas. 198; *Swigert v. Hannibal, etc., R. R. Co.*, 9 Am. & Eng. R. R. Cas. 322.

Passenger Alighting from Moving Train Guilty of Contributory Negligence.—A passenger who attempts to get off a moving train, even if he sees himself being carried past his destination, is generally held guilty of such contributory negligence as precludes recovery. *Illinois Central R. R. Co. v. Able*, 59 Ill. 131; *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441; *Ohio & M. R. Co. v. Schiebe*, 44 Ill. 460; *Lambeth v. N. C. R. R. Co.*, 66 N. C. 494; *Lucas v. New Bedford & T. R. Co.*, 6 Gray, 64; *Savett v. Manchester & L. R. Co.*, 16 Gray, 501; *Simon v. N. Y. Cent. & H. R. R. Co.*, 3 Rob. (N. Y.), 25; *Galveston, H. & S. C. R. Co. v. Gierso*, 51 Tex. 189; *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593; *Harvey v. Eastern R. R. Co.*, 116 Mass. 269; *Knight v. Ponchartrain R. Co.*, 23 La. Ann. 462; *Jeffersonville, etc., R. Co. v.*

Hendricks, 26 Md. 288; Penna. R. R. Co. v. Aspell, 23 Pa. St. 147; Dougherty v. C., B. & Q. R. R. Co., 86 Ill. 467; Dumont v. New Orleans R. R. Co., 9 La. Ann. 441; Hubner v. N. O. & C. R. R. Co., 23 La. Ann. 492; Doss v. M. K. & T. R. Co., 59 Mo. 37; Atchison, etc., R. Co. v. Flynn, 1 Am. & Eng. R. R. Cas. 240; Price v. St. L., K. C. & N. R. R. Co., 3 Am. & Eng. R. R. Cas. 365; Lake Shore & M. S. R. Co. v. Bangs, 3 Am. & Eng. R. R. Cas. 426; Jewell v. Chicago, etc., R. Co., 6 Am. & Eng. R. R. Cas. 379; Houston, etc., R. R. Co. v. Leslie, 9 Am. & Eng. R. R. Cas. 407.

In the following cases the question of contributory negligence was held to be one for the jury: Price v. St. L., K. C. & N. R. R. Co., 3 Am. & Eng. R. R. Cas. 365; Treat v. Boston & L. R. Co., 3 Am. & Eng. R. R. Cas. 423.

Passenger Alighting after Train has Started.—Where the train after having come to a stand-still is again started, a passenger is not warranted in attempting to alight. Illinois Central R. R. Co. v. Slatton, 54 Ill. 133; Chicago & N. W. R. Co. v. Scates, 90 Ill. 586; Davies v. Chicago & N. W. R. Co., 18 Wisc. 175; Imhoff v. Chicago & M. R. Co., 20 Wisc. 344; Morrison v. Erie R. R. Co., 56 N. Y. 304; Phillips v. R. & S. R. R. Co., 49 N. Y. 177; Lucas v. W. B. & T. R. Co., 6 Allen, 64.

Even where the train has not stopped a sufficient length of time to allow a passenger to alight safely, it has been held that he is guilty of contributory negligence when he attempts to alight after the train has started. Jewell v. Chicago, etc., R. R. Co., 6 Am. & Eng. R. R. Cas. 379. But see contra Strauss v. Kansas City R. Co., 6 Am. & Eng. R. R. Cas. 384. And see Brooks v. Boston & Me. R. R. Co., and note supra.

Passenger Alighting from Moving Train by Advice or Order of Conductor.—As to how far an order from the conductor or other person in authority will warrant a passenger in attempting to jump from a moving train, the authorities are not harmonious. The weight of authority is to the effect that the mere expression of advice or opinion by the conductor to that effect, will not warrant a party in attempting it. Chicago, B. & Q. R. R. Co. v. Hazard, 26 Ill. 373; Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510; Jeffersonville R. R. Co. v. Swift, 26 Ind. 459; Lambeth v. N. C. R. R. Co., 66 N. C. 794; Columbus R. R. Co. v. Powell, 40 Ind. 87.

But words tantamount to a command will warrant the party in attempting it, and the company will in such case generally be held responsible for the consequences. St. Louis, etc., R. R. Co. v. Cantrell, 8 Am. & Eng. R. R. Cas. 198; Georgia R. R. Co. v. McCurdy, 45 Ga. 288; Filer v. N. Y. Central R. R. Co., 49 N. Y. 47; Klein v. Central Pac. R. R. Co., 37 Cal. 400.

But see Pittsburg, etc., R. Co. v. Krouse, 30 Ohio St. 222. Generally where a passenger alights from a moving train at the command or at the instance of a railway official, the question of contributory negligence is for the jury. Muchado v. Brooklyn C. R. Co., 30 N. Y. 370; Ernst v. Hudson River R. R. Co., 35 N. Y. 38.

See also McIntyre v. N. Y. Central R. R. Co., 27 N. Y. 287; Nichols v. Sixth Ave. R. R. Co., 38 N. Y. 131; Eppendorf v. B. & N. R. R. Co., 69 N. Y. 195; Downie v. Hendrie, 13 Cent. L. J. 371; Penna. R. R. Co. v. McCloskey, 23 Pa. St. 526.

Passengers in Peril.—Where a passenger in the course of his transportation by a common carrier suddenly perceives that he is in peril, caused by the negligence of the carrier, it seems that he is warranted in attempting to make his escape by jumping from the vehicle, provided that an ordinarily prudent and reasonable man placed in a similar situation would have done the like, and if in thus attempting to make his escape he is injured, the carrier is responsible. Jones v. Boyce, 1 Stark. 402; Ingalls v. Bills, 9 Metc. 1; Stokes v. Saltonstall, 13 Pet. 181; Frinketal v. Potter, 17 Ill. 406; McKinney v. Nere, 1 McL. 540; Card v. Ellsworth, 65 Me. 547; Galena v. Chicago Union R. R. Co. v. Yarwood, 15 Ill. 468; s. c., 17 Ill. 509; Galena & Chi-

cago Union R. R. Co. v. Fay, 16 Ill. 558; Collins v. Albany & S. W. R. R. Co., 12 Barb. 493; S. W. R. R. Co. v. Panck, 24 Ga. 356; Hill v. N. O., O. & Gt. W. R. R. Co., 11 La. Ann. 292; Wilson v. Northern Pacific R. R. Co., 26 Minn. 278; Mobile & M. R. R. Co. v. Ashcraft, 48 Ala. 16; Bull v. N. Y. Central R. R. Co., 31 N. Y. 314; Eldridge v. Long Island R. R. Co., 1 Sandf. (N. Y.) 89; Iron R. R. Co. v. Mowery, 3 Am. & Eng. R. R. Cas. 361; Nashville & C. R. Co. v. Erwin, 3 Am. & Eng. R. R. Cas. 465; Smith v. St. Paul, etc., R. R. Co., 9 Am. & Eng. R. R. Cas. 262; Pittsburg, etc., R. R. Co. v. Rohrman, 12 Am. & Eng. R. R. Cas. 176.

Exceptional Circumstances.—Under certain exceptional circumstances parties have been held warranted in jumping from moving trains. Lloyd v. Hannibal & St. Jo R. Co., 53 Mo. 509; Pennsylvania R. R. Co. v. Kilgore, 39 Pa. St. 292; Chicago, etc., R. R. Co. v. Bonifield, 8 Am. & Eng. R. R. Cas. 493.

ATCHISON, TOPEKA AND SANTA FÉ R. R. Co.

v.

HARVEY.

(*Advance Case, Kansas. April 7, 1884.*)

Where the jury in their special findings returned that the actual damage done to a passenger by a sudden starting of the train while she was alighting amounted to \$300, a general verdict for \$700 will be set aside, where the circumstances are not such as to entitle the plaintiff to exemplary damages.

The answers to some of the special questions in this case held so evasive and unsatisfactory as to warrant the belief that the railroad company did not have a fair and impartial trial and therefore to warrant reversal.

ERROR from Osage County.

Geo. R. Peck, C. N. Sterry, A. A. Hurd, and W. O. Campbell for plaintiff in error.

Ellis Lewis for defendant in error.

PER CURIAM.—This was an action brought by Mary Harvey against the Atchison, Topeka & Santa Fé R. R. Co., for injuries alleged to have been caused by the negligence and carelessness of the company. The petition alleges that on August 3, 1882, the plaintiff was a passenger on the cars of the company going from Osage City to Peterton, the latter being a station on the line of the road where trains regularly stop to take on and let off passengers; that after the train had stopped at Peterton and while the plaintiff was getting off, she was violently thrown from the train of cars upon the ground and greatly injured and bruised upon her face and arms; and that such injuries were caused by the company failing to stop its train at the proper place and by starting and running its cars on its railroad track after the train had stopped

and before the plaintiff had got off the cars, and she had time or could get off the cars, and by starting the train before she knew, or had reason to know, that the train was going to be moved or started.

Within the authority of the *Union Pacific Ry. Co. v. Fray*, the judgment in this case must be reversed. The general verdict of the jury is for \$700. The jury returned in their special findings that the actual damages of the plaintiff by reason of her injuries were \$300. It is not claimed that the plaintiff is entitled to exemplary damages. If it were intended to give the \$400 for pain and suffering of the plaintiff, as claimed by counsel, that sum should have been included in the actual damages specially found by the jury. It was not so included, and, therefore, we cannot say with any certainty what the \$400 were given for. Further than this, some of the answers to the special questions are so evasive and unsatisfactory as to lead to the belief that the railroad company did not have a fair and impartial trial.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

McQUILKIN

v.

CENTRAL PACIFIC R. R. Co.

(*Advances Case, California. January 22, 1884.*)

Where a railroad company has provided a platform on one side of its track on which passengers may alight, an attempt of a passenger to get off on the other side is not negligence per se.

The act or omission on the part of a passenger, claimed to have contributed to the injury complained of, must have direct relation to the act or omission charged to be negligence on the part of the carrier. Whether such act or omission was negligence, and whether such negligence was to any extent an immediate concurring cause of the injury, are matters to be decided by the jury.

If the negligence of the passenger contributed directly or proximately to the injury complained of, no recovery can be had against the carrier, whatever may have been his negligence. It is not giving the defendant the benefit of this rule as to contributory negligence to charge the jury that the negligence of the plaintiff which contributed as a proximate cause to the injury will prevent a recovery, provided the defendant has not been guilty of negligence.

APPEAL from a judgment of the Superior Court for Alameda County, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

Cope & Boyd for the appellant.

Montgomery and Montgomery & Martin for the respondent.

THE COURT.—We cannot say that the court below ought to have granted a nonsuit on the ground that plaintiff's evidence showed the negligence of the mother of the infant plaintiff proximately contributed to the injury. The position of defendant's counsel is, that where a railroad company has provided a platform on one side of its track, on which passengers may alight, an attempt of a passenger to get off on the other side is negligence per se. We think that the fact, if proved, that the mother of plaintiff attempted to alight on the side where there was no platform is to be taken in connection with the other physical conditions proved; the question whether she was guilty of contributory negligence to be determined by the jury upon all the evidence bearing on that question.

The act or omission on the part of a plaintiff claimed to have contributed to the injury must have direct relation to the act or omission charged to be negligence on the part of a defendant. Whether the attempt to get from the platform at the rear of the car to the ground was, under the circumstances proven, negligence, and whether such negligence was, to any extent, an immediately concurring cause of the injury, were matters to be decided by the jury.

The cases cited by appellant do not sustain its position—in view of the facts proved in this case. In *Pennsylvania R. R. v. Zebe*, 33 Pa. St. 318, it appeared that a passenger got off “on the wrong side,” and stepped upon another track, where he was injured by a moving train. There was a platform on each side of the tracks within the depot, and trains frequently met at that point. It was said that the passenger who voluntarily got off his car, and on the track on the inner side, could not recover in an action against a railroad company, unless there was gross negligence on the part of the latter in permitting the passenger thus to leave the car. The question did not arise upon nonsuit, but upon a request of the trial court to declare the law, or “state the point,” that if the plaintiff “voluntarily and negligently” placed himself where he did, when there was a safe mode of exit, and full opportunity to use it, the defendant was not liable as a common carrier. *Id.* 323, 324. A second judgment for the plaintiff in the same action seems to have been reversed for error in permitting two witnesses to testify that they were in the habit of getting off on the same side the train as did plaintiff. *Id.* 423. It is plain such evidence was inadmissible.

In Michigan it has been held that the mere failure of a railroad company to have a platform on each side of a station is not to be regarded as of itself negligence. There it appeared the plaintiff arrived at a station before the cars came in, and deliberately

walked on the side most distant from the platform, etc., and was there injured in attempting to board the train. The court held plaintiff could not be said to have affirmatively proved that she was free from all contributory negligence—by the law of Michigan the burden of proof being on the plaintiff to show that there was no contributory negligence on her part. *Michigan Central R. R. v. Coleman*, 28 Mich. 440. In California contributory negligence is a defence to be established by defendant, unless the evidence on the part of the plaintiff shall prove a want of reasonable care on his part. *Robinson v. W. P. R. R. Co.*, 48 Cal. 428.

Bancroft v. Boston, etc., R. R., 97 Mass. 275, was a case in which the plaintiff's intestate was, under the circumstances proved, held guilty of contributory negligence in attempting to cross a track from which he was hurled by an engine.

The English case, *Siner v. Great Western Ry., L. R.*, 3 Ex. 150, L. R., 4 Ex. 117, is a case unlike the one at bar in every respect, except that in that case as in this, the platform was not as long as the train.

The court below charged the jury in effect, that the plaintiff was entitled to recover, although the evidence showed that her mother was guilty of negligence contributing proximately to the injury, unless the defendant was guiltless of any negligence in a certain particular.

The following instruction embodies the idea repeated in other portions of the charge: "If you believe from the evidence that there was at the time of the injury complained of a safe platform at Market Street station for the use of passengers in getting on and off the cars, it was the duty of any passenger desiring to leave the train to get off on the platform; and if the mother of the plaintiff disregarded this duty and attempted to get off with the plaintiff on the other side of the train where there was no platform, and thereby caused or contributed to the injury, the action cannot be maintained, and you must find for the defendant; provided, you believe from the evidence that the train stopped long enough to enable the mother and child with reasonable diligence to have landed upon the platform."

At the trial the plaintiff claimed the defendant was negligent in starting the train too soon, and, as said by counsel for appellant, "the legal proposition embodied in the instruction is that the defendant must have been free from negligence in that respect in order to prevent a recovery by reason of the negligence of the mother."

"But if the negligence of the mother of plaintiff contributed directly or proximately to the injury, she ought not to have recovered, whatever the negligence of the defendant. It is not giving the defendant the benefit of the rule as to contributory negligence to say that the negligence of the plaintiff which contrib-

uted as a proximate cause to the injury will prevent a recovery, provided the defendant has not been guilty of negligence.

Judgment and order reversed, and cause remanded for a new trial.

Contributory Negligence of Passenger in Alighting on Wrong Side of Train.—Where a sufficient platform for purposes of egress is provided by the railroad company, notwithstanding which a passenger voluntarily alights on the other side of the train and is injured accordingly, the general rule is that he cannot recover. *Pennsylvania R. R. Co. v. Zebe et ux*, 33 Pa. St. 318; *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 275; *Forsyth v. Boston and Alb. R. R. Co.*, 103 Mass. 510; *Gonzales v. New York, etc., R. Co.*, 38 N. Y. 440.

But where the arrangements are such as to reasonably warrant a passenger in descending on the other side, the company still owes him a duty of protection, and the question of contributory negligence is for the jury. *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Caswell v. Boston, etc., R. Co.*, 98 Mass. 194; *Gaynor v. Old Colony R. Co.*, 100 Mass. 208; *Chaffee v. Boston, etc., R. R. Co.*, 104 Mass. 108; *Mayo v. Boston, etc., R. Co.*, 104 Mass. 137; *Wheelock v. Boston, etc., R. Co.*, 105 Mass. 203; *Green v. Erie R. Co.*, 11 Hun, 338; *Hoffman v. N. Y., etc., R. R. Co.*, 13 Hun, 589; *Keller v. N. Y., etc., R. Co.*, 24 How. Pr. 172; *Phillips v. Rensselaer & S. R. Co.*, 57 Barb. 644; *Hulbert v. N. Y. Central R. R. Co.*, 40 N. Y. 145; *Columbus & Ind. Cent. R. Co. v. Farrell*, 31 Ind. 408; *Penna. R. R. Co. v. White*, 88 Pa. St. 327.

WARD

v.

CHARLESTON CITY RY. CO.

(19 *South Carolina Reports*, 521.)

Plaintiff having announced that she had no challenges to make, and the defendant then having challenged two jurors, the plaintiff could not afterwards demand a right of challenge; therefore, the denial of such right by the circuit judge was not error of law.

Witnesses who saw a lady thrown down by a street car after she had alighted, can state in evidence their opinion as to whether she had time to get clear of the car before it moved off.

THIS was an action by Harriet Ward against the Charleston City Ry Co., a street horse-car corporation, commenced July 27th, 1881. The complainant alleged serious injury to herself caused by the carelessness, negligence, etc., of the driver of the car in not giving her proper time to free herself and get out of the way of the car, and she demanded judgment for \$10,000, her damages. The opinion sufficiently states the facts and points involved in the impanelling of the jury, and the evidence of the witnesses.

In dismissing the motion for a new trial, the circuit judge, in addition to what is quoted in the opinion here, said :

But even under the plaintiff's counsel's understanding of the facts, I do not see that an error was committed. . . . Could the plaintiff at this juncture then have challenged peremptorily any one of the nine of the original panel after they had been solemnly accepted? We think not, and base this opinion upon the language of the present jury law, and the aforesaid interpretations of an exactly similar law of 1841. It is too well established in practice to bear questioning, that when a party has accepted a juror and he is sworn in the cause, it is too late then to object to him peremptorily. The plaintiff so accepted eleven of this jury, and the defendant and plaintiff united in accepting nine of the twelve.

Besides, it would be perhaps in many cases greatly prejudicial to the rights and interest of a defendant, were a plaintiff allowed to accept a certain number of jurors, and, after the defendant rejects his quota, and the panel is filled anew, then to allow the plaintiff to step forward and exercise the right to challenge peremptorily any of those to whom he declared he had no objection. If such a course were allowed to either party, the other might be trifled with. It is possible that were such a rule to prevail, a wary litigant might purposely avoid challenging in the first instance experimentally, in order to take advantage of his opponent's challenges, and the drawing of the supernumeraries. In fact, it is very probable that each side would struggle to gain this vantage ground.

So that, not even from the view of the facts of the case as set forth by plaintiff, do we think she lost any right under the action and ruling of the court. Had the plaintiff, after the defendant had challenged, but before the drawing of supernumeraries had begun, asked the court to allow her to reconsider the matter, and challenge peremptorily, the court would have granted the indulgence, notwithstanding that she had in the first instance deliberately accepted eleven; but after the filling up of the jury, it was too late to recommence the peremptory challenge of jurors.

As to the plaintiff's second ground, I cannot see the force of it. The defendant's counsel asked a witness on the stand, who saw the accident to the plaintiff, whether, in his opinion, she had time after alighting from the car to get clear of it before it moved on. This was objected to by plaintiff's counsel. I directed the question to be put thus, viz., whether, as a matter of fact, she did have time to get clear of the car. This was objected to by plaintiff's counsel. The witness answered in the affirmative. I regard the question as tending not to extract a mere opinion, but a fact, to wit: the witness' estimate of the length of the time which an occurrence under his observation consumed.

Campbell & Whaley for appellant.
Buist & Buist contra.

SIMPSON, C. J.—The appellant, Harriet Ward, brought action against the defendant, respondent, to recover damages for injuries alleged to have been caused by the negligence of defendant's agents and servants. The accident occurred while appellant was leaving the car of defendant, and is alleged to have taken place because she was not allowed sufficient time to free herself from the car.

When the case was called for trial, the plaintiff, being first called upon by the court to know if she had any objection to the jury, replied that she had none, except that if there was any stockholder of the company on the jury he should retire, whereupon one person retired. The plaintiff interposed no other objection. The defendant then peremptorily challenged two jurors. At this juncture, and while the clerk was preparing to fill the panel from the supernumeraries, the plaintiff claimed her right to challenge. The court understood this to be an intimation on the part of the plaintiff, that she would claim the right to challenge the jurors thus drawn to fill the panel, which he ruled could not be done. The understanding, however, of the plaintiff, as afterwards stated by her counsel, was, not that she should have the right to challenge the jurors drawn to fill the places vacated on account of defendant's challenge, but that her right to challenge generally revived after the defendant's challenge.

No objection was made to the charge of the judge, but during the progress of the trial several witnesses who were present and saw what occurred were asked by defendant's counsel, as follows, to wit: To John McPherson, "Whether the lady was or was not far enough from the car to allow it to go on without throwing her down?" To W. E. Vincent, "Was she a sufficient distance from the car to avoid the accident?" And to Philip Fogarty, "You think she was given plenty of time to get off and move away except for the drays?" These questions were objected to as calling for the opinion of the witnesses. The presiding judge directed the question to be put in this form, "Whether as matter of fact she had time to get clear of the car?" This was objected to.

The verdict was for the defendant. The counsel of plaintiff then moved the court for a new trial on the grounds: 1. "Because the plaintiff made no peremptory challenge, only requesting that if there be a stockholder he should retire; that a juror did retire, whereupon the defendant made two peremptory challenges, and the plaintiff then claimed that her right to challenge reverted, and it was disallowed. 2. Because at the close of defendant's case, the defendant asked of a witness, whether in his opinion the plaintiff had sufficient time to clear herself of defendant's

car, and the plaintiff objected to the question and the objection was overruled." There was also a third exception upon another ground (as to the financial condition of the company), but this seems to have been abandoned, and, therefore, not necessary to be noticed further. These grounds were overruled by the circuit judge, and the appellant now appeals, renewing her motion for a new trial on substantially the same grounds relied on in the motion below.

As to the first ground, it is conceded by both parties that, under the facts as understood by the circuit judge, his ruling was strictly in accordance with the law, as expounded in several cases from our own court, where the precise question was made and adjudged. See cases *Kleinback ads. State*, 2 Spears, 418; *Huff v. Watkins*, 15 S. C. 83; *Gunter v. Graniteville Manufacturing Co.*, 15 S. C. 448, and *Burckhalter v. Coward*, 16 S. C. 435.

The appellant insists, however, that there was a misunderstanding as stated above. Admit this and can it help the appellant? The judge ruled that it could not. True, in *Kleinback ads. State*, Judge Butler, in delivering the opinion of the court, did say, that the act of 1841 did not in terms require either party to be the first actor in making the challenge. On this subject he further says: "Both parties are independent and either may make the challenge without regard to the position of the other. When the plaintiff forbears to make the move in the first instance, it should not be in the power of the defendant to compel him to do so, or otherwise lose it altogether, and if the defendant should think proper to exercise his right it will not then deprive the plaintiff in turn from claiming his. Either has the option to claim the privilege before the jury shall be charged in the case."

In the case now under consideration, however, the plaintiff did not simply forbear to exercise her right in the first instance, holding it in reserve to be exercised afterwards, but the judge states that when called upon to speak, her counsel, after surveying the jury, answered that she had no challenge to make except as to stockholders, if any; after a stockholder had retired the counsel then stated that there was no further objection by the plaintiff to the remaining jurors. The defendant was then called upon to challenge if he desired to do so. This was something more than a mere forbearance on the part of the plaintiff; it was an announcement that she waived the privilege of exercising her right. There was no denial on the part of the court; on the contrary the right was tendered to her at the proper time, and having waived the exercise of it then, for the reasons given by the circuit judge we think it was too late to demand it after the defendant had exercised his right.

There must be system and uniformity in the mode of conducting trials, and in this respect much must be left to the discretion

of the presiding judge. It is the general practice, as we understand, in the matter of challenges in civil cases, that the right shall first be tendered to the plaintiff and then to the defendant, and if either declines when tendered and announces the fact that he does not intend to challenge, there is an end of it, unless under peculiar circumstances the judge might allow it revived as to either. In this case we do not think that there was any error of law on the part of the judge in refusing appellant's claim, and, therefore, we cannot disturb it.

The other question raised is as to the competency of certain questions propounded to the witnesses, which were objected to by appellant on the ground that they called for opinions merely, and not facts. It is a general rule of evidence that opinions of witnesses are not competent, but to this there are several exceptions; for instance, experts may give opinions, and even ordinary witnesses, after stating the facts upon which their opinions are founded, may also state their opinions resting on the facts. *Seibles v. Blackwell*, 1 McMull. 56. And, then, there are many matters in reference to which opinion is the only testimony of which they are susceptible. See the recent case of *Jones v. Fuller*, 19 S. C. 66, in which McIver, A. J., fully discusses such cases.

Time, distance, velocity, form, size, age, strength, heat, cold, etc., are subjects of this character. Whart. Ev., § 612, note, p. 490. The ground upon which opinions are admitted in such cases, says Mr. Wharton, is that, from the nature of the subject, it cannot be stated in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to it. In *Hackett v. Boston, Concord & Montreal R. R. Co.*, 35 N. H. 390, the court said: "That in most cases, when a witness is examined as to distances, dimensions, weight, or any quality of matter in question, he cannot testify except by the use of language which necessarily implies his opinion." See, also, the case of *Commonwealth v. Sturtivant*, 117 Mass. 133. Under the principle upon which these cases were decided, we think the question propounded here was competent, especially as the witnesses were present when the accident occurred, and were speaking from the facts as they occurred within their sight and under their immediate observation.

It is the judgment of this court that the judgment of the circuit court be affirmed.

The conductor of a street car is bound to stop a sufficient time to allow the passengers to alight. *Crissly v. Hestonville & Mantua R. R. Co.*, 75 Pa. St. 83; *Pouliss v. Broadway, etc., R. Co.*, 61 N. Y. 621; *Chicago City R. Co. v. Mumford*, 8 Am. & Eng. R. R. Cas. 312; *Wardle v. New Orleans City R. Co.*, 13 Am. & Eng. R. R. Cas. 60. But see *Brown v. Congress & Baker Sta. R. Co.*, 8 Am. & Eng. R. R. Cas. 383.

GERMANTOWN PASSENGER RY. Co.

v.

BROPHY.

(Advance Case, Pennsylvania. January 25, 1884.)

Where a person sits in a street car with his arm resting on a window-sill wholly within the car, and by a sudden collision his arm is thrown out and broken, his occupying such a position is not contributory negligence in law. In an action by such person against the railroad company to recover damages for his injuries, the question of the plaintiff's contributory negligence is properly submitted to the jury.

ERROR to the Common Pleas No. 2 of Philadelphia County.

Case by John Brophy against the Germantown Passenger Ry. Co. to recover damages for personal injuries suffered through the alleged negligence of the company defendant.

On the trial, before Mitchell, J., the following facts appeared:

On September 19, 1881, the plaintiff was riding in a car of the defendant, and was sitting in the rear left-hand corner with his arm resting on the ledge of the window-sill. When the car reached Twenty-fifth Street and Girard Avenue, where there is a sharp curve, it ran into and collided with another car which was turning the curve at the same time, and in consequence the plaintiff's arm was thrown out of the window and broken. There was some conflict of testimony as to the plaintiff's exact position at the time of the accident. Some of the witnesses testified that he was sitting with his arm out of the window. This was contradicted by others, and the plaintiff himself testified:

"I was sitting, one leg thrown over my knee and my elbow on the sill against the back of the car. The windows were open and stuck up about two inches, and I had my arm against it, right against top of window-sash. I was inside of both windows. . . . I was sitting on the south side of the car in rear end, opposite the second window, when car came to curve; just as car I was in came to curve, the other car struck my car and threw my arm out of the window."

It appeared in evidence that it was a rule of the company that the down car should stop while the other car was rounding the curve.

The defendant submitted, inter alia, the following point:

"(5) If the plaintiff placed his arm on the window-sill and by a jolt of the car it was thrown out of the window, and he was injured, he was guilty of contributory negligence, and he cannot recover." Answer: "I refuse that, gentlemen, as a question of law. I leave it to you. It will be for you to consider as a ques-

tion of fact whether, if this plaintiff was riding in that way, it was negligence on his part which contributed to the injury."

Verdict for plaintiff for \$1000. The defendant thereupon took this writ, assigning for error, inter alia, the answer to his point as above.

Samuel Gustine Thompson for plaintiff in error.

The position of the plaintiff below was an unusual one. He was not sitting as passengers usually sit. If he had been, there could have been no accident. The unusual position in the seat, and the occupation of the window, were the causes that produced the accident.

It is not a case where the accident could have occurred without regard to the position of plaintiff below, but it is one where it could only have occurred in consequence of the position of plaintiff. *R. R. Co. v. McClurg*, 56 Pa. St. 297; *Camden and Atlantic R. R. v. Hoosey*, 99 Pa. St. 492; *Todd v. Old Colony and Fall River R. R.*, 7 Allen, 207; *Willis v. Long Island R. R.*, 32 Barb. 399; *Hickey v. Boston R. R. Co.*, 14 Allen, 429.

Rudolph M. Shick (James S. Nickerson with him) for defendant in error.

The verdict of the jury has established the fact that the arm of the plaintiff below was not out of the window. He was entirely inside the car.

It is submitted that under such a state of facts it was not a case of clear negligence on the part of the plaintiff below to sit as he did, and that it was not the duty of the court to determine it as a question of law. *Pass. R. R. Co. v. Walling*, 97 Pa. St. 61; *Lauderback v. Pass. R. W. Co.*, 40 Leg. Intel. 271; *Pass. R. R. Co. v. White*, 88 Pa. St. 333.

MERCUR, C. J.—The jury found on most ample evidence that the plaintiff in error was guilty of negligence in the act which caused the injury.

The company has two railway tracks, separated by so narrow a space on a curve that when its cars were passing in different directions they came in collision, whereby the defendant in error, a passenger in one of the cars, was injured. The main contention is whether he was guilty of contributory negligence in producing the injury to his arm. The evidence was conflicting as to his position at the time the collision occurred. The company claimed and gave some evidence that his arm projected out of the windows. He testified that while the windows were open they stuck up about two inches, and he had his arm against the top of the window-sash and inside of both windows, and that the collision threw his arm out of the window.

The learned judge charged if he sat with his arm out of the window when the collision occurred, he was guilty of negligence,

and could not recover. Not satisfied with this, the counsel for the company requested the court to charge if the defendant in error placed his arm on the window-sill and by a jolt of the car it was thrown out of the window and he was injured, he was guilty of contributory negligence, and could not recover. The court refused to so charge, but left it to the jury to find whether if he was so riding it was negligence on his part which contributed to the injury. The company has no just cause of complaint of this answer. It would have been clear error if the court had instructed the jury that occupying such a position was negligence in law. Resting his arm upon the window-sill wholly within the car created no legal presumption of negligence. If it constituted negligence, it was a fact to be found by the jury, to whom it was submitted, and it was not to be so declared by the court. In the absence of a collision with an external object his arm was in no danger of injury. He was under no legal obligation to assume or anticipate that the company would run another car against the one in which he was sitting. The window-sill in a railway car is substantially the top of the back of the seat. It cannot be declared negligence in law for a passenger to so rest his arm, and the jury has found it is not negligence in fact. No assignment of error is sustained.

Judgment affirmed.

DUN

v.

SEABOARD AND ROANOKE R. R. Co.

(*Advance Case, Virginia. February 14, 1884.*)

Upon the issue of negligence, when the facts upon which the charge depends are disputed, the question is one of mixed law and fact. The jury must ascertain the facts and the court must instruct them as to the rule of law which they are to apply to the facts as they shall find them. But when the direct fact in issue is established by undisputed evidence, and such fact is decisive of the case, a question of law is raised and the court should decide it. The jury have no duty to perform. Nor is the court bound to submit to the jury the question of negligence (although there may be conflict of evidence as to some of the facts relied upon as proving it) if, after rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses.

D., a passenger on the S. & R. R. R., sitting with his arm outside the open window of a car in rapid motion, was struck upon the elbow by some cord-wood ranked near the track and severely hurt. In an action to recover damages for the injury, upon the demurrer of the defendant, *Held*:

I. The plaintiff was guilty of negligence which contributed to his injury, and he is not entitled to recover damages therefor.

II. One who is injured by the mere negligence of another cannot recover compensation therefor if he by his own negligence or wilful wrong contributed to produce the injury, so that but for his concurring and co-operating fault it would not have happened except when the direct cause of the injury is the omission of the other party, after being aware of the injured party's negligence, to use a proper degree of care to avoid the consequence of such negligence.

ERROR to the Hustings Court of Portsmouth.

Trespass on the case by John P. Dun against the Seaboard and Roanoke R. R. Co. to recover damages for an injury sustained by plaintiff while a passenger on one of the defendant's trains. Judgment for the defendant upon demurrer to the declaration. The plaintiff brought this writ. The facts are fully stated in the opinion.

Borland & Brooke for plaintiff in error.

Holladay & Gayle for defendant in error.

LAOY, J.—The case is as follows: On the 19th of August, 1880, the plaintiff in error was a passenger in the cars of the defendant company, and the said plaintiff in error having his arm outside of the window of the car while the train was rapidly moving along the track, was struck upon his arm outside of the window by some cord-wood ranked near the track of the road and was seriously hurt. In March, 1881, suit was instituted by the said plaintiff in error against the said railroad company, claiming \$5000 in damages against the said company for alleged carelessness and negligence in the said railroad company in causing the said injury to be inflicted upon him, and set forth in his said declaration that his arm when the injury was sustained was resting outside of the window of the car a short distance, to wit, about two inches, and alleging that the said cord-wood had been negligently allowed to be stacked too close to the road.

To this declaration the defendant company demurred, and the demurrer was sustained by the court. Whereupon the plaintiff in error applied for and obtained a writ of error to this court.

The assignments of error are, first, that the order of the 25th of October, 1881, was erroneous because it withdrew from the consideration of the jury the question of negligence as a fact, and decided it as a matter of law; and, second, because the plaintiff's conduct, as admitted in the declaration, did not constitute such contributory negligence as to bar recovery; that what constitutes negligence is a question of fact for the jury; that the court could not pronounce that any given facts proved constituted negligence or want of due care on the part of the plaintiff in error without encroaching on the rights of the jury, whose exclusive province it was to weigh the evidence and determine whether it was sufficient

for that purpose. "That this case was one especially proper to be submitted to a jury, for while there are extreme cases which hold the question of negligence to be at times a question of law for the court, even they limit the doctrine to those cases where the standard of duty is fixed and certain, not variable; where the party has failed in the performance of some clear legal duty; where the necessary and inevitable inference from the undisputed facts is one of negligence." That in this case the duty of the plaintiff was to exercise ordinary care, such care as an ordinarily prudent man would under the same circumstances exercise; and that ordinary care being the measure of duty, the question of negligence must of necessity be referred to the jury. That the plaintiff's conduct in riding with his arm outside of the car window, as admitted in the declaration, does not constitute such contributory negligence as to bar recovery; that the plaintiff's conduct to bar recovery must not only have been such as constitutes negligence, but negligence so contributing to the accident that it would not have been avoided by the exercise of due care and prudence on the part of the defendant at the time of the occurrence.

The defendant in error, on the other hand, insists that the plaintiff in error was guilty of contributory negligence, which was the proximate cause of the injury sustained by him, and that a person who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury if he by his own or his agent's negligence, or wilful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except when the mere approximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the other party is exposed, to use a proper degree of care to avoid injuring him.

The declaration in this case having set forth the fact that the plaintiff had his arm outside of the car window when it was struck in passing the wood-rank, the defendant by his demurrer admitted all the facts charged in the declaration to be true, not only as to the alleged fact that the plaintiff's arm was out of the window, but also that the cord-wood was negligently piled too near the passing trains to admit of a passenger's arm being placed outside of the car window even so far, and thus raised before the court the question whether the plaintiff could recover in an action against a defendant for alleged negligence, if the plaintiff had on his part been guilty of contributory negligence, which was the immediate and proximate cause of the injury.

If the case the plaintiff has made in the declaration in this case is one for which, under the rules of law applicable to the question involved, there could be no recovery, then the demurrer was properly sustained; while on the other hand, if under the said

rules of law the plaintiff was entitled to some recovery, the demurrer should have been overruled and the case submitted to the jury upon the facts, with proper instructions from the court upon the law of the case.

The sole question for this court to decide in this case is, whether a person who is injured by the negligence of another, not wilful or intentional, can recover in an action therefor when he by his own negligence proximately contributed to the injury, so that but for his co-operating fault the injury would not have happened, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence.

In this case it is distinctly admitted in the declaration that the proximate cause of the injury was the negligent act of the plaintiff, while riding in the defendant's railway carriage, in putting his arm outside the window of the same while the train was running at a great rate of speed; and it is also admitted by implication equally as plain that if the plaintiff's arm had not been outside the said carriage the injury would not have happened.

If the injury which the plaintiff sustained was occasioned by the negligence of the defendant, and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury; but if there was negligence on the part of the defendant and also on the part of the plaintiff, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances. *Richmond & Danville R. R. Co. v. Anderson*, 31 Gratt. 812.

"It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured concurring with that of the other party, no action can be maintained." *Railroad Co. v. Jones*, 95 U. S. 439, opinion of Justice Swayne.

While the foregoing is admitted and approved by this court in the case of the *Danville R. R. Co. v. Anderson*, supra, it is there so held subject to the qualification that a plaintiff may under certain circumstances be entitled to recover damages for an injury, although he may by his own negligence have contributed to produce it; and this upon the authority of the case of *Tuff v. Warman*, 5 Q. B. N. S. (94 E. C. L.) 573.

In that case the court said: It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own

negligence or want of ordinary care and caution that but for such negligence or want of ordinary and common care and caution on his part the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not, as but for his own fault the misfortune would not have happened. Mere negligence, however, on the part of the plaintiff would not disentitle him to recover unless it were such that but for that negligence that misfortune would not have happened; nor if the defendant might by exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. See *Butterfield v. Forrester*, 11 East, 60; *Bridge v. The Grand Junction Ry. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 545; *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 194, E. C. L. vol. 85; *Cooley on Torts*, 675; and the case of *Radley v. London & Northwestern Ry. Co.*, 1 Appeal Cases (Law Reports, 1875-6), 754, 759. The foregoing English rule has been followed in this country, and adopted certainly in this State in the recent decisions of this court on this subject (*Richmond & Danville R. R. v. Anderson*, *supra*), and in many other States of the Union. *Kerwhaher v. The Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172; *Northern Central Ry. Co. v. The State*, use of Price and others, 17 Md. 8; *Baltimore & Ohio R. R. Co. v. State*, use of Trainer and others, 33 Md. 542; *Brown v. The Hannibal & St. Joseph R. R. Co.*, 50 Mo. 461, decided in 1872; *Central R. R. & Banking Co. v. Davis*, 19 Geo. 437; *Isbell v. New York & New Haven R. R. Co.*, 25 Conn. 556; *Macon & W. R. R. Co. v. Davis' Adm'r*, 18 Geo. 679; *Herring v. Wil. & Raleigh R. R. Co.*, 10 Iredell (Law) 402; *Baltimore & Ohio R. R. Co. v. Sherman's Adm'r*, 30 Gratt. 602, and the same *v. Whittington's Adm'r*, 30 Gratt. 805; *Sherman and Redfield on Negligence*, §§ 25, 494 (3d ed.); *Wharton on Negligence*, § 388; *Hutchinson on Carriers*, § 635; *Bright-hope Ry. Co. v. Rogers*, 76 Va. 443; *O., A. & M. R. R. Co. v. Miles*, 76 Va. 773; *Richmond & Danville R. R. v. Moore's Adm'r*, V. L. J., February No., 1884.

In the case of the *Northern Central R. R. Co. v. State*, 31 Md. 357, it is held that when from the proofs of the nature of the accident it appears that the negligence of the parties was concurrent and co-operated to produce the injury no action will lie, the law refusing to apportion the fault, and regarding the negligence of either party as equally proximate. *Louisville & Nashville R. R. Co. v. Burke*, 6 Caldwell, 45; *Owens v. Hudson River R. R. Co.*, 35 N. Y. 576; *Owens v. Hudson River R. R. Co.*, 2 Bosworth, N. Y. 374; *Same v. Same*, 7 Bosworth (1860); *McKeon v. Citizens' R. R. Co.*, 43 Mo. 405; *Toledo & W. R. R. Co. v. Goddard*, 25 Md. 185; *Cattawissa R. R. Co. v. Armstrong*, 49 Penn. St. 186; *Potter v. Chicago & Northwestern R. R. Co.*,

21 Wis. 372; *Williams v. Michigan Central R. R. Co.*, 2 Mich. 259; *Memphis & Charleston R. R. Co. v. Whitfield*, 44 Miss. 466.

That a person who by his own default has brought upon himself a loss or an injury can claim no loss or compensation for it from another, is a principle of universal application; and it is equally true that if his imprudence or negligence has so materially contributed to the loss or the injury that but for such imprudence or negligence it would not have occurred, he can claim no recompense from another who has been instrumental in causing it, unless the latter, upon the discovery of the danger into which the party had brought himself by his own fault, could by the use of such diligence as the extent of the danger and the nature of the threatened injury required have avoided the occurrence.

If, in other words, the injury, though inflicted by another, was unavoidable by the exercise of proper diligence by reason of the situation of peril into which the party by his own neglect had placed himself, he must be considered as the party solely in fault and as the author of his own misfortune. The carrier owes to the passenger not only the duty of transportation but the duty of exercising for his safety the utmost care and diligence compatible with the nature of the carriage; it owes to him the still further duty of warning him against danger when it is at hand, and of cautioning him against acts of imprudence which may endanger his person, whenever the circumstances are such that the safety of the passenger would seem to require it. *Hutchinson on Carriers*, pp. 502, 505.

The question whether a party has been negligent in a particular case is one of mingled law and fact. It includes two questions: Whether a particular act has been performed or omitted; this is a pure question of fact. Whether the performance or omission of this act was a legal duty; this is a pure question of law. The extent of a person's duties is to be determined by a consideration of the circumstances in which he is placed. The law imposes duties upon men according to the circumstances in which they are called to act. When the facts are disputed the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them. *Purvis v. Coleman*, 1 Bosw. 321.

When, however, the direct fact in issue is established by undisputed evidence, and such fact is decisive of the case, a question of law is raised and the court should decide it. The jury has no duty to perform. The issue of negligence comes within this rule. *Dascomb v. Buffalo & State Line R. R. Co.*, 27 Barb. 221. Questions of care and negligence after the facts are proved must be decided by the court. *Biles v. Holmes*, 11 Ired. (N. C.) Law R. 16; *Avera v. Sexton*, 11 Ired. 247; *Heathcock v. Pennington*,

11 Ired. Law, 640; *Herring v. Wilmington, etc., R. R. Co.*, 10 Ired. Law, 402.

A judge is not bound to submit to the jury the question of negligence, although there may be a conflict of evidence in relation to some of the facts relied on as proving it, if, rejecting the conflicting evidence, the negligence charged is conclusively proved by the defendant's own witnesses. *Moore v. Westevelt*, 1 Bosw. 357.

In the case we are considering the facts are stated by the plaintiff in his declaration upon which he claims a recovery. These facts, on the other hand, are admitted by the defendant, and the question is submitted to the judge of the court below as a question of law, whether upon the facts there stated, which are all agreed, and none of which were controverted, the plaintiff is entitled to any recovery? It is nowhere alleged in the declaration that the contributory negligence of the plaintiff was known to the defendant, and that the defendant, seeing his danger in which he had placed himself, did not exercise the required diligence on his part to prevent the injury by warning the plaintiff of the threatened danger. The court, as we have said, held that the negligence of the plaintiff was the immediate cause of the injury which he suffered, and that without such negligence on his part the injury to him would not have happened.

The question thus raised as to the negligence of a passenger in a railway carriage thus committed by riding with a part of his body outside of the carriage, has often been the subject of judicial investigation in the courts of other States.

In the case of *Laing v. Colder*, 8 Penn. St. R. 479, the arm of a passenger was broken whilst he was travelling on a railroad car. The accident occurred while the car was passing over a bridge which was so narrow that the plaintiff's hand, lying outside of the car window, was caught by the bridge and the arm was broken. In this case the court held that the merely suffering the hand to remain outside the window was not necessarily negligence which would bar a recovery. But in a subsequent case, in the same court, of the *Pittsburg R. R. v. McClurg*, 56 Penn. St. 294, where an injury had been sustained by a passenger from a similar cause, it was held that the thoughtless, or imprudent protrusion of the elbow from the window of a car was negligence per se, etc., which would exempt the company from all liability, although the hurt was produced by the passenger's arm coming in contact with a car standing on a switch on defendant's road. A passenger, said Thompson, C.J., is to be presumed to know the use of a seat and the use of a window; that the former is to sit in and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy but not to occupy. Its use

is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If therefore he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled as to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not to be, and where they are liable to be broken without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court.

And in the case of *Todd v. The Railroad*, 3 Allen, 18, 7 Id. 207, where an action was against a railroad company to secure damages for a personal injury to the elbow of a passenger extended through an open window, it was held that there was no liability upon the company.

In that case the court said: "Looking at the mode in which railroads are constructed, with posts and barriers which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which the cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person travelling on a railroad is exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions." It was therefore held that if a passenger's elbow extended through the open window beyond the place where the sash would have been if the window had been shut, it was the duty of the court to rule that it was such carelessness as to prevent a recovery of damages by him. And the rule thus laid down has been followed in many subsequent cases. *Louisville R. R. v. Stickings*, 5 Bush. 1; *Indianapolis R. R. v. Rutherford*, 29 Ind. 82; *Pittsburg R. R. v. McClurg*, supra; *Pittsburg R. R. v. Andrews*, 39 Md. 329; *Holbrook v. The Railroad*, 12 N. Y. 236. According to these decisions the protrusion of the limbs of the passengers, even to the minutest distance, out of the windows of the car will be regarded as necessarily and under all circumstances such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in guarding against such accidents.

A different rule has been laid down in other cases, in other States of the Union, and in some of them the courts have gone so far as to hold that the carrier is responsible for such injuries received under such circumstances, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put any of his limbs outside of the window. *New Jersey R. R. v. Kennard*, 21 Penn. St. 203; *Spencer v. The Railroad*, 17 Wis. 487; *Chicago R. R. v. Pendrom*, 51 Ill. 333.

But we are constrained to withhold our sanction from these cases. It seems to be the better rule, both upon authority and upon reason, that the passenger being endowed with intelligence which enables him to foresee and to avoid danger, the exercise of at least ordinary prudence is required on his part to escape it; and if by his failure to exercise these faculties for his own preservation a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibilities will not be thrown on the carrier.

The carrier is held to the utmost care and circumspection which can be exercised under all the circumstances, so far as human care and foresight can go. It ought not to be held necessary, and can be so held upon no sound principles, that the carrier should barricade and bar the windows, to the partial exclusion of light and air and to the discomfort, and, in case of collision or other accident of like kind, at a sacrifice of the safety, of all. It many times happens, when trains have collided and the cars telescoped, that the doors are jammed up so as to be useless; fire is often the immediate result, and the open windows in such cases furnish the only means of escape from a horrible death. To bar the windows would increase the danger as well as the discomfort of railroad travel, and the same reason which would commend the bars on the windows would as well require the doors to be locked and barred; and then all these precautions would prove unavailing when the passenger sought to avoid the restraints thus imposed. We do not think such restraints and precautions ought to be held necessary in order to prevent intelligent and rational beings from thrusting their heads or their limbs through the windows of swiftly moving trains.

It is better we think to adhere to the rule already established in this court cited above, that "One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he by his own ordinary negligence or wilful wrong contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence, to use a proper degree of care to avoid the consequences of such negligence." *Huff v. Warman*,

5 Q. B. (N. S.) 573, *supra*; Richmond & Danville R. R. Co. v. Anderson, 31 Gratt., *supra*.

And we are therefore of opinion that there is no error in the judgment of the court of the city of Portsmouth appealed from, and the same must be affirmed.

Judgment affirmed.

Passenger sitting with Arm projecting from Window.—In most States it is held to be contributory negligence *per se* for a passenger to allow his arm to project out of the car window. Winters v. Hannibal & St. Jo. R. Co., 89 Mo. 468; Pittsburg & Connellsville R. R. Co. v. McClurg, 56 Pa. St. 294 (overruling Laing v. Colder, 8 Pa. St., 479, and New Jersey R. R. Co. v. Kennard, 21 Pa. St. 203); Holbrook v. Utica & Schenectady R. R. Co., 12 N. Y. 236; Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329; Todd v. Old Colony & Fall River R. Co., 8 Allen, 18; *s. c.*, 7 Allen, 207; Indianapolis, etc., R. Co. v. Rutherford, 29 Ind. 82; Morel v. Mississippi V. L. I. Co., 4 Bush. 435; Louisville & Nashville R. R. Co. v. Sickings, 5 Bush. 1.

In other States the question of contributory negligence is left to the jury. Spontner v. Milwaukee, etc., R. Co., 17 Wisc. 487; Chicago & Alton R. R. Co. v. Pendrom, 51 Ill. 333.

But see Fascaw v. Kelly, 11 Am. & Eng. R. R. Cas. 104, and Germantown Pass. R. Co. v. Brophy, *supra*.

FLECK

v.

UNION RY. CO.

(184 Massachusetts Reports, 480.)

A passenger in a street car, after signalling to the conductor to stop the car, left his seat and stood for a moment, while the car was in motion, on the rear platform, upon which there was an accumulation of snow and ice, rendering the platform slippery, expecting that the car would stop so that he could alight, and omitted to take hold of the rail. The car jolted, and he was thrown off. *Held*, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received, was a question of fact for the jury, and not of law for the court.

TORT for personal injuries occasioned to the plaintiff by being thrown from a horse-car belonging to the defendant. Answer, a general denial. Trial in the Superior Court, before Bacon, J., who reported the case for the determination of this court, in substance as follows:

The plaintiff testified, that, on December 27, 1880, it snowed in the forenoon, but stopped snowing at about noon; that about half-past ten o'clock in the evening of that day he got into a car belonging to the defendant, in Harvard Square, to ride to Dover Street in North Cambridge; that this car had four horses attached to it on account of there being snow on the ground; that the car

was an ordinary close car, with a door and platform on each end and seats on each side running the entire length of the inside; that he sat on the right-hand seat at the end nearest the driver; that, when the car got within about one hundred and fifty feet of Dover Street, he got up and nodded his head to the conductor to stop the car; that the conductor was standing on the rear platform, opposite the doorway (the door being wide open), leaning against the dasher; that the plaintiff walked slowly to the rear end of the car and stepped on to the platform and stood a moment, expecting that the conductor would stop the car when it got to Dover Street; that the car jolted and made a little jounce, and his feet slipped, and he was thrown off the car head first, receiving the injuries complained of; that the platform had ice and snow upon it, which was slippery and not very level; that it was on account of this ice and snow, and of its being slippery and not very level, that he fell. On cross-examination, the plaintiff testified that he saw snow and ice on the platform, and that it was slippery when he got into the car, but he did not take particular notice, and did not slip when he went in; that he did not have hold of anything, as he supposed that the car would stop and that he was not going to stand there very long; and that he had ridden in the defendant's cars for about fifteen years, and never had an accident before.

At the close of the plaintiff's testimony, the judge directed a verdict for the defendant. If the facts, as testified to by the plaintiff, showed, as a matter of law, such want of due care that he was not entitled to recover, the verdict was to stand; otherwise, the verdict to be set aside and a new trial granted.

G. A. Perkins for the plaintiff.

W. H. Martin for the defendant.

ALLEN, J.—There was some evidence tending to show carelessness on the part of the plaintiff, but, under all the circumstances stated, it was not so palpable as to preclude him from a right to have it passed upon by the jury. Standing on the rear platform of a street car in motion, when there is room inside, is not conclusive. The existence of snow and ice upon the platform is not necessarily such an element of danger as to be conclusive proof of negligence on the part of one who, with knowledge, undertakes to stand there for a moment or two, in expectation of the car's stopping to let him get off. Omitting to take hold of the rail will not of itself, as matter of law, prevent a recovery. Nor do these facts when combined show a case where common experience and the general sense of all prudent persons at once stamp the act as one of carelessness and reckless disregard of personal safety. The case does not fall within *Wills v. Lynn & Boston R. R.*, 129 Mass. 351, and other cases, where it could properly be held that, as matter of law, the plaintiff did not sustain the burden of prov-

ing that he was in the exercise of due care; but rather within the class of cases of which *Treat v. Boston & Lowell R. R.*, 131 Mass. 371; s. c., 3 Am. & Eng. R. R. Cas. 423, may be taken as an example. No question is presented as to whether there was any sufficient evidence of negligence on the part of the defendant. The case had not reached a proper stage for a ruling on that point. New trial granted.

Whether Passenger on Street Car is guilty of Contributory Negligence in standing on Platform is for Jury.—The act of a passenger in a street car in standing upon the platform is not contributory negligence per se. The question of his contributory negligence is generally for the jury. *Meesel v. Lynn & Boston R. Co.*, 8 Allen, 284; *Augusta, etc., R. R. Co. v. Renz*, 55 Ga. 126; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; *Hardencamp v. Second Ave. R. R. Co.*, 1 Sweeny, 490; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *Germantown Pass. Ry. Co. v. Walling*, 2 Am. & Eng. R. R. Cas. 20; *Seigel v. Eisen*, 41 Cal. 109; *Nolan v. Brooklyn City & N. R. Co.*, 25 Alb. L. J. 72; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Nolan v. Brooklyn C. & N. R. Co.*, 3 Am. & Eng. R. R. Cas. 463; *People's Pass. R. Co. v. Green*, 6 Am. & Eng. R. R. Cas. 168; *Hestonville, etc., R. R. Co. v. Kelly*, 11 Am. & Eng. R. R. Cas. 123.

In certain cases the court has held as matter of law that a passenger on a street car is not guilty of contributory negligence in riding upon the platform. *Clark v. Eighth Ave. R. R. Co.*, 86 N. Y. 185; *Sheridan v. Brooklyn & N. R. Co.*, 86 N. Y. 39; *Burns v. Bellefontaine R. R. Co.*, 50 Mo. 139.

Again, under certain circumstances, such conduct will be held contributory negligence per se. *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596; *Baltimore City Pass. R. Co. v. Wilkinson*, 80 Md. 224; *Wood v. Central Park R. R. Co.*, 11 Abb. Pr. (N. S.) 411; *Wells v. Lynn & B. R. R. Co.* 2 Am. & Eng. R. R. Cas. 27; *Downey v. Hendrie*, 8 Am. & Eng. R. R. Cas. 386.

If the plaintiff's presence on the platform has no causal connection with the injury done him, it is disregarded. *Thirteenth and Fifteenth Sts. Pass. Ry Co. v. Boudrou*, 2 Am. & Eng. R. R. Cas. 30.

LOUISVILLE, NASHVILLE AND GREAT SOUTHERN R. R. Co.

v.

HARRIS.

(9 *Lea (Tennessee)*, 180.)

A traveller on a railroad train, travelling on a commutation coupon ticket, which provides that the coupons shall be void if detached by any other person than the conductor, and that the ticket shall be shown to the conductor each trip, who shall detach the coupons for the number of miles to be travelled, technically violates the contract by detaching the coupons himself. If, while detaching the coupons, his attention be called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor, in which event it would be the duty of the latter, if he saw the coupons detached or could readily ascertain by inspection that they had been detached from the ticket, to accept

them. But the conductor would not be bound to receive the detached coupons without seeing the ticket.

If such a passenger refuse to deliver his ticket to the conductor on demand, and insist upon making payment of his fare with coupons which he has himself detached, it would be a violation of the contract by him, for which he may be put off the train, with such force as may be necessary, in case he refuse to go voluntarily; and he cannot, while being lawfully ejected, regain the right to passage by a tender of his fare in a rude, boisterous, or insulting manner.

The weight of authority is that a passenger, who has first violated the contract of passage by a failure to pay his fare at the proper time upon demand, cannot, by tendering the fare when he is being put off, or upon a re-entry after ejection, acquire a right of passage, but the strict rule ought, perhaps, to be confined to wilful violations of contract.

APPEAL in error from the Circuit Court of Carroll County. C. Aden, J.

Cole & Sweeney for Railroad.

Alonzo Hawkins for Harris.

COOPER, J.—Harris brought this action against the railroad company, and recovered damages for being ejected from the train. The company appealed in error.

Harris was travelling as agent for Johnson, Newman & Co., upon a commutation ticket issued to that company for several thousand miles, with coupons attached, and put up in the form of a book. The contract expressly provided that the ticket should be shown to the conductor each trip, who will detach such coupons as would represent the number of miles travelled by the holder on his train, and that the coupons would be void if detached by any one but the conductor. Each coupon stated that it was good for a given number of miles, "when not detached from the contract." The plaintiff says he knew that the coupons were void if detached by any other person than the conductor. He got on the train with the commutation ticket to go to a point named about twenty-four miles distant. When he saw the conductor coming on his round for tickets, he took his book from his pocket, and commenced detaching some of the coupons, when the conductor told him he need not do that, for he would not take them. Plaintiff replied, "I guess you will." The conductor said, "I am employed to do that," and added, "you will pay your fare." Plaintiff replied, "here is my fare," and offered him the detached coupons. Here there is a conflict in the testimony as to what took place. The conductor and another person present say that the conductor asked for the plaintiff's book, which the plaintiff refused to let him have, saying that the conductor might put him off and he would sue the company. The plaintiff, and a witness present also at the time, deny that the book was demanded, but agree that angry words were interchanged between the plaintiff and the conductor. The colloquy wound up by the conductor telling the plaintiff that he must

get off at the next station, the plaintiff replying that he would not, and the conductor replying that he would put him off. When the train stopped at the next station, the conductor said to the plaintiff: "This is the station and you must get off." The plaintiff replied: "You will have to put me off." The conductor took hold of the lapel of the plaintiff's coat and jerked him up, but immediately released him, and told plaintiff to get off the train. Plaintiff said he would not do it. The conductor then got behind plaintiff and pushed him along the aisle to the front end of the car, and out of the front door. On the front platform an acquaintance of the plaintiff was standing, and plaintiff called upon him to witness that he had tendered his fare to the conductor. The plaintiff, having his book with the detached coupons in his left hand, held them out to the conductor, and said to him: "Here is my ticket, and I tender you my fare," and, with an oath, "I dare you to put me off." The conductor then pushed him off the car on to the platform of the depot. The coupons, it should be added, seem to have been detached by the plaintiff in the presence of the conductor, either wholly or partially.

The plaintiff had a right to be carried to his place of destination in the defendant's train on paying the usual rate of fare on demand, and according to the terms of the contract under which he was travelling. Those terms were that the ticket should be shown to the conductor, who would detach the coupons. It was a technical violation of the contract, by which the coupons were rendered void, for the plaintiff to detach the coupons himself. Upon having his attention called to the fact that it was the conductor's duty to detach the coupons, he should at once have desisted, and handed the book and coupons to the conductor. If he had done so, and the conductor had seen the coupons detached, or could have readily ascertained by inspection that they had been torn from the book, it would have been the duty of the conductor to have received the coupons. But he was clearly not bound to receive the detached coupons without seeing the ticket or book. The plaintiff's proof tended to show that the conductor had not demanded the book, and that the book was not tendered to him until, in the process of ejection, the parties had reached the front platform. The defendant's proof was that the conductor had demanded the book, and the plaintiff had refused to deliver it. And the remark of the conductor, testified to by the plaintiff himself, "that he must take him for a damned thief," strongly sustains the defendant's version of what occurred, for, otherwise, the expression would be unmeaning. Be this as it may, the real contest was over what took place before the tender on the front platform, and the effect of that tender. If the plaintiff refused to deliver his ticket to the conductor on demand, or even failed to deliver it when the

plaintiff understood that it was virtually demanded according to the usage in such cases, and the plaintiff insisted upon making payment with the coupons which he himself had detached, the contract was broken by him, and he could not insist upon its performance by the company. The conductor had a right to put him off the train, and, upon his refusal to go, to use such force as was required to accomplish that result. In this view, according to the plaintiff's own version of what took place, the defendant might reasonably contend that it was in no wrong, at least up to the tender on the platform. The defendant was entitled to have the jury specially instructed upon the law applicable to such a state of facts. It was also entitled to a special instruction as to the law applicable to the alleged tender.

Upon examining the charge of the court, we find that it lays down the general principles regulating the liability of a railroad company, as a carrier, to a person on its train as a passenger, and the measure of damages for a wrongful eviction. But there is no charge whatever on the special facts of this case. The defendant requested his Honor to give certain special instructions to cover the omission, which he declined to do upon the ground that he had already given them in substance. We are unable to concur with his Honor in this respect. The charge is in substance that the plaintiff insists that he was wrongfully ejected, while the defendant contends that the plaintiff had violated the contract, and was ejected with no more force than was necessary, and if the jury shall find that plaintiff was wrongfully ejected, their verdict should be in his favor, but otherwise in favor of the defendant. It nowhere instructs the jury as to the effect of the failure or refusal of the plaintiff to show his ticket to the conductor, and of the tender of coupons detached by himself, where the contract between him and the company required such showing, and that the coupons should be detached by the conductor; nor the effect upon the measure of damages of what took place in the body of the car, upon the supposition, if the jury should so find, that the plaintiff had violated the contract, and that no more force was used than necessary to remove the plaintiff from the cars, he having refused to go. These were the objects of the first three special instructions. The defendant was entitled to have the jury instructed as to the law applicable to these facts, although not necessarily in the exact language of the instructions presented.

The fourth and last special instruction asked by the defendant is as follows: "If, however, you find that the plaintiff tendered the conductor his book on the platform, and did so in an insulting and boisterous manner, cursing the conductor at the time, and the conductor declined to accept the fare tendered in such manner, and ejected him, using no more force than necessary, then the plaintiff

cannot recover." The court declined to so charge, but instructed the jury that it made no difference how the fare was tendered: "whether in a rude, or boisterous or insulting manner, the agent was bound to accept the fare, and you need not consider the manner of the plaintiff in tendering the fare."

If the plaintiff failed to pay his fare at the time, when, according to the regulations of the company, it should have been paid, and upon reasonable demand made therefor, he himself broke the contract, and could not insist upon its fulfilment. And the weight of authority is that, in such case, he cannot, by tendering the fare, when he is being put off, or upon re-entry after ejection, acquire a right to passage. *Thomp. on Carr.* 340, where the cases are collected in a note. The right, it is said, to refuse to transport the plaintiff further, and to eject him from the train, would be an idle and useless exercise of legal authority, if the party who had hitherto refused to perform the contract by paying his fare when duly demanded, could immediately re-enter the cars and claim the fulfilment of the contract. *O'Brien v. Boston, etc., R. Co.*, 15 Gray, 20. If one passenger, it has been said, might by his unjustifiable conduct delay the train to put him off, another might do the same thing, and thus the utmost irregularity in the running of the train be produced, jeopardizing the safety of the company's property, and the lives of all on board. *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *State v. Campbell*, 32 N. J. L. 309; *Fulton v. Grand Trunk R. Co.*, 17 U. C. 428. The strict rule thus laid down ought, perhaps, to be confined to wilful violations of contract upon proper demand. It would not apply, as we held in a recent case at Nashville, where the passenger went on board under an honest belief that he could pay his fare in a particular form, and was unable to pay in any other way, and a tender was made by a third person on his behalf while he was being ejected. Nor will it apply where there was an honest, although mistaken assertion of right, when the tender was made by the passenger himself while quietly submitting to the legal right of the company to eject him. But the rule would exist only in name if a passenger who had wilfully violated his contract, and compelled the officer of the company to resort to force to remove him, were permitted to obtain the full benefit of the contract by a tardy and ungracious tender, made in a manner to disturb other passengers, and tending to a breach of the peace. A passenger is not entitled at any time to tender his fare in a rude, boisterous, and insulting manner, although ordinarily the manner would not be permitted to invalidate the fact. He certainly has no such right when he is being lawfully ejected for a wilful breach of contract. Of course, we do not mean to express any opinion on the facts of this case. It is the province of the jury to pass upon them, under a proper charge of the law.

The judgment must be reversed, and the cause remanded for a new trial.

Passenger may be compelled to exhibit Ticket.—The company may by its regulations compel a passenger to exhibit his ticket when asked so to do. *Ripley v. New Jersey, etc., Trans. Co.*, 81 N. J. L. 388; *Bennett v. Railroad Co.*, 7 Phila. 11; *Douns v. New York, etc., R. Co.*, 36 Conn. 287; *Woodard v. Eastern Counties R. Co.*, 30 L. J. (M. C.) 186; *Lane v. East Tenn., etc., R. Co.*, 2 Am. & Eng. R. R. Cas. 278. But see *Maples v. New York, etc., R. Co.*, 38 Conn. 557.

Passenger being expelled for non-payment of Fare cannot continue to ride on tender of Fare.—A person who refuses to pay his fare and is being put off in consequence, acquires no right by the tender of his fare to continue as a passenger. *Stone v. Chicago, etc., R. Co.*, 47 Iowa, 82; *State v. Campbell*, 32 N. J. L. 309; *People v. Jillson*, 3 Park Cr. Cas. 234; *O'Brien v. Boston, etc., R. Co.*, 15 Gray, 20; *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Fulton v. Grand Trunk R. Co.*, 17 Upp. Can. Q. B. 428; *Hoffbauer v. D. & N. R. R. Co.*, 52 Iowa, 342; *O'Brien v. N. Y. C. & H. R. R. Co.*, 1 Am. & Eng. R. R. Cas. 259; *Skillman v. Cincinnati, etc., R. R. Co.*, 13 Am. & Eng. R. R. Cas. 81.

But see *Garrett v. Louisville & N. R. Co.*, 3 Am. & Eng. R. R. Cas. 416.

CURL

v.

CHICAGO, R. I. AND P. RY. CO.

(*Advance Case. April 25, 1884.*)

When a passenger failing to pay his fare is expelled from the train by the conductor before he has time to borrow the amount from a fellow-passenger, he is not entitled to recover exemplary damages from the railroad company unless there was malice on the part of the conductor in ejecting him.

APPEAL from Washington. Opinion upon rehearing. See s. c., 11 Am. & Eng. R. R. Cas. 85.

M. A. Low for appellant.

Wilson & Kellogg for appellee.

BECK, J.—A rehearing having been allowed in this case, it has been again argued. Upon a reconsideration of the whole case, and all arguments submitted therein, we remain satisfied with the conclusions announced in the foregoing opinion upon all questions discussed and decided therein. They are so fully and clearly presented that nothing more need be said in their support. However, one objection urged by counsel for defendant escaped our attention in our former consideration of the case. We are satisfied that it was well taken, and that thereon the judgment of the court below ought to be reversed. We will proceed to consider it.

The petition alleges that the conductor "maliciously, unlawfully, brutally, forcibly, wrongfully, and violently" ejected plaintiff from the car. As applicable to the issue joined upon this allegation of the petition, the court gave an instruction in the following language: "(10) If you find for the plaintiff, and that the conductor had no right to eject him from the train, and the evidence satisfies you that the plaintiff suffered pain of body, or was put to trouble and inconvenience in travelling to a place of shelter, in consequence of the ejection, you should allow him as damages such sum as in your sound discretion will fully and fairly compensate him therefor. And if you find that the conductor wilfully used unnecessary force in ejecting the plaintiff from the train, you may allow reasonable punitive damages, such as in your sound discretion is commensurate with the wrong, and will tend to prevent the recurrence of those like it." This instruction is erroneous in that it does not make the recovery of exemplary damages dependent upon malice of the wrong-doer. It holds that the wilful use of unnecessary force is a ground for allowing exemplary damages. An act wilfully done may not be accompanied by malice; that is, a spirit of enmity, malevolence, or ill-will, with a desire to harm, and a disposition to injure. One may wilfully do an act with innocent purposes; that is, he may obstinately, stubbornly, and with design, act lawfully and with good intentions. The instruction fails to present the thought that the element of malice must accompany acts of the kind complained of in the petition, otherwise the injured person cannot recover exemplary damages. This doctrine is recognized in numerous decisions of this court. See *Fitzgerald v. C., R. I. & P. Ry. Co.*, 50 Iowa, 79; *Jones v. Marshall*, 56 Iowa, 739; *Brown v. Allen*, 35 Iowa, 306.

For the error found in the instruction quoted above the judgment of the Circuit Court must be reversed.

WALKER

v.

WABASH, etc., R. Co.

(Advance Case, St. Louis Court of Appeals. April 1, 1884.)

Where a person purchases of a railway company a passage ticket from one point to another point, and enters upon the performance of the journey, the company is obliged to carry him only in the event that he continues upon its vehicle until the transit is ended; a fortiori he cannot compel the carrier to allow him to leave its train whenever he may choose, and to introduce a third person who is to perform the rest of the journey in his place.

Where a railroad conductor gives to a passenger who has purchased a

limited passage ticket from A to C, a check, upon which were the words "continuous passage," as well as punches and marks, made in accordance with rules which are supposed to be understood by the servants of the company alone, and for their instruction, and at B he sells such check to a broker, who sold it to the plaintiff, the plaintiff thereby acquired no right to use such check for the balance of the journey in the place of him who originally received it.

APPEAL from the St. Louis Circuit Court.

THOMPSON, J.—The plaintiff desiring to go from St. Louis to Chicago, thought he would save a little money by buying a ticket of a broker. So he went to the office of Mr. Manget, on the corner of Fifth and Chestnut streets, and purchased a train check, which with the punches in it presented the following appearance:

(Here follows the check, which has marks punched out indicating to the conductors that it was good for a continuous passage only from Council Bluffs to Chicago via St. Louis, if used before July 19, 1883, midnight. The rest of the facts appear in the opinion.)

This train check, it will be perceived, does not purport to be a regular passage ticket. The name of the place from and the place to which the holder is to be carried is not stated; on the reverse side it is countersigned in ink by the conductor by whom it is issued to the passenger; and the particular check was in fact issued by one of the defendant's conductors to a passenger other than the plaintiff, who had taken passage on one of the defendant's trains the day previous at Council Bluffs, upon a limited ticket for Chicago by way of St. Louis. It seems that this passenger had travelled as far as St. Louis, when he had left the train and sold this train check to the broker from whom the plaintiff bought it.

With this he went with his baggage to the Union Depot, and there presented it to the porter of the defendant's evening train, who allowed him to get aboard. It also passed the inspection of the bridge conductor; but when the train had got beyond the bridge, the regular train conductor came around, examined it, told the plaintiff that it was not good, and that he would have to pay fare or get off at the next station. The plaintiff declined to do either, and the conductor and porter put him off, without unnecessary violence, at a station called Edwardsville, eighteen miles from St. Louis. He stayed all night at Edwardsville, came back to St. Louis the next morning, and afterwards bought a ticket, and again started for Chicago according to his original plan. This statement indicates substantially the amount of damage which he suffered. For this damage he brought the present action, and a jury gave him five hundred dollars.

At the trial, the defendant put in evidence a book of instructions issued by the defendant to conductors and agents, which starts out by saying that "in order to prevent the scalping of

limited and unlimited first-class tickets, reading between prominent points on this company's lines, it is deemed advisable to take up such tickets on first presentation and issue a continuous passage train check in exchange, and for the proper issuance of continuous passage train checks the following rules are given." Then follow a series of minute directions in regard to the issuing and punching train checks; the cautions which are to be given to the passengers to whom such checks are given; what reports conductors are to make touching the same; what they are to do in the case of a misunderstanding with the passenger, and the like. The numbers by which the leading stations on the defendant's lines of roads are designated on these train checks are also given, from which it appears that Council Bluffs is designated by the number 885, St. Louis by the number 601, and Chicago by the number 501. When these train checks are issued in exchange for a limited passage ticket, which the conductor takes up, he is required to punch the word "limited" in the margin of the check. With these instructions in view, recurring to the train check which this plaintiff had bought, it is seen that the number 885, in the column marked "from" in the tint, was not punched according to the instructions, this should have been done by the defendant's conductor when he issued the check to the passenger. It also appears that the word "limited" was not punched, as the rules required. It further appears that, in the column marked "to" in the tint, the figure 501 was punched. Then, at the bottom of the check, there were punched the word "July," the figure 1 in the left-hand column of figures, and the figure 9 in the right-hand column of figures. The punch marks indicated, according to the instructions put in evidence, and also in accordance with what appears on the face of the check, that the check would not be good unless used before midnight of the 19th of July, 1883. In this regard also, the defendant's conductor had not punched the ticket according to the instructions, which prescribe that "Checks must be limited to one day from date of issue. For instance; a check issued on January 1st must be punched to expire on January 2d." This check was issued by the defendant's conductor, to a passenger, as already stated, on the 17th of July, and was punched to expire on the 19th. The train on which this passenger was, arrived in St. Louis on the morning of the 18th, it would seem on the usual time. The defendant's next regular train for Chicago left St. Louis half an hour later, namely, at 8 o'clock in the morning, so that it appears that the train on which this plaintiff took passage for Chicago was not a continuous train in respect of the train on which the previous holder of the ticket had arrived in St. Louis. Paragraph 108, of the defendant's instructions to agents and conductors already referred to, is as follows: "these checks, when issued in accordance with the foregoing instructions, will be treated as valid passage

tickets, and they will be subject to the same rules concerning 'trip cancellations' that are now in force for regular tickets; such cancellations, however, must be made in that portion of the check designated by stars (* * *) and, of course, these cancellations will be regarded as additional to those above mentioned." There is no evidence that these instructions are communicated to the public or to the ticket brokers, or to any persons except the defendant's conductors and agents, for whose guidance they are intended. We mention this fact because it seems important to take into consideration in determining whether the public are entitled to buy these checks of any one who may happen to hold them, just as they are entitled to buy an unused passage ticket, and to compel the railway company issuing the same to a performance of the contract thereby expressed.

It is quite clear that a train check, such as the one which this plaintiff bought, punched as it was punched, affords an unscrupulous broker the means of practising a fraud upon a traveller. A broker, with a copy of these instructions to conductors and agents in his hand, could explain to the traveller that the word "limited" had not been punched out, therefore, that it had not been given in exchange for a limited passage ticket. He might further explain to him that the figures "885" had not been punched out, and therefore, that it did not appear from the check that it had been given to a passenger who had started from Council Bluffs, and, hence, that it did not appear that it had been given for a passage, a part of which had been performed. He might also draw inferences in favor of the goodness of the check from the fact that, in addition to the date of the transaction, it had another whole day to run. But whilst it is so, it does not appear upon what principle a traveller can have a right to regard such a check as a promise on the part of the company to transport any person until the date named, from St. Louis to Chicago, neither of which places are named upon its face. Moreover, the check purports on its face to be good only for a continuous passage, and it does not appear upon what ground a member of the public could infer from this, that one man has a right to travel on it over one portion of the route for which it is given, and another man a right to travel on it over the remaining portion. It is quite clear, therefore, that the holder of this check was not entitled to regard it as an ordinary passage ticket.

The defendants prayed at the close of the plaintiff's testimony, and again at the close of the whole case, an instruction in the nature of a demurrer to the evidence, which the court refused to give. The court refused all the instructions prayed by the defendant, and, in lieu thereof, gave the following instruction of its own motion. "The jury are instructed that the ticket read in evidence was valid for one continuous passage on regular passenger

trains of defendant (if presented before 12 o'clock midnight of July 19, 1883) to Chicago from the point where such ticket was delivered to a passenger on some of defendant's trains; and if the jury find from the evidence that said ticket was so issued by defendant at some point westward of St. Louis, to a passenger on some train of defendant then bound to St. Louis, and that, after the arrival of said train at St. Louis, the train which plaintiff took for Chicago was the next regular passenger train of defendant leaving St. Louis for Chicago, and that plaintiff was ejected at Edwardsville Junction from said train after having duly exhibited said ticket to the conductor of said train before midnight of July 19th, 1883, then the jury should return a verdict for plaintiff."

We take the view that the court erred in refusing the defendant's instructions in the nature of a demurrer to the evidence, and also in giving the above instruction of its own motion. Recurring to the plaintiff's petition, it will be perceived that the plaintiff avers that, on the 18th of July, the defendant for a reward undertook to carry the plaintiff as a passenger from St. Louis, Missouri, to Chicago, Illinois. Now he proves no such undertaking. He merely proves that he purchased, not of the defendant, but of a ticket broker, a cabalistic printed card, called a train check, which had some marks of a conductor's punches upon it, and which did not purport to be an agreement to carry any one from St. Louis to Chicago. This did not at all make out the averment just recited from the petition; and the defendant, therefore, should have had the peremptory instruction which it prayed at the close of the plaintiff's case. Then, when the defendant's case was opened, the meaning of this printed card was developed, and it appeared beyond question, that it was in the nature of a private token, intended by the aid of a private book of rules and explanations to pass the holder from one of the defendant's conductors to another, over a long line of travel; that it had not been sold by the defendant to this plaintiff, nor to any one else; but that a limited passage ticket had been sold by the defendant to another person by which the defendant had obligated itself to carry the holder of such ticket from Council Bluffs to Chicago, by way of St. Louis; that such holder had entered upon the performance of such journey; that thereupon, the defendant's conductor had taken up his passage ticket, and had given him this card in exchange for the same, neglecting to punch it, according to the instructions; that by this card or train check, the defendant recognized its obligation to carry such passenger to Chicago on that continuous passage. But, clearly, it did not thereby agree to carry such passenger to St. Louis, and then to carry some one else to Chicago. The agreement to carry the holder on a continuous passage expresses what we understand to be the obligation which the company stood under by law, at the time when the conductor issued this train check;

for, in the absence of an agreement, of a statute or of public usage to the contrary, it is the settled law that when a person purchases of a railway company a passage ticket from one point to another point, and enters upon the performance of the journey, the company is obliged to carry him, only in the event that he continues upon its vehicle until the transit is ended. *McClure v. Railroad Co.*, 34 Md. 532; *Dietrich v. Penn. R. Co.*, 71 Pa. St. 432; *Churchill v. Chicago & C. R. Co.*, 67 Ill. 391; *Hatten v. Railroad Co.*, 13 Am. & Eng. R. R. Cas. 53. The transit is an entire thing; the passenger cannot oblige the carrier, nor can the carrier oblige the passenger, to split it up into parts, and to perform it piecemeal; and the reason is that it costs the company more, and that its risk is greater when the transit is broken up into parts than when it is performed continuously, because in the latter case there is at each section of the transit the loading and unloading of baggage.

It is very clear then, if the passenger cannot compel the carrier to perform his contract in sections in respect of himself, after he has entered upon the transit, for stronger reasons, he cannot compel the carrier to allow him to leave its train wherever he may choose, and to introduce a third person who is to perform the journey in his place. Moreover, if the contract does not allow the passenger the privilege of stopping off at a particular place, it is still more difficult to understand any principle upon which he is entitled to stop off at such place, and then, instead of resuming the journey himself on a subsequent train, to introduce some one else in his stead, and compel the carrier to complete the contract by carrying such other person on a subsequent train. No decision has been cited to us, which countenances such a construction of the obligation which a railway carrier assumes when it sells a limited railway passage ticket, and we do not know of any such decision. It is very clear then, that the defendant was entitled to the peremptory instruction prayed for at the close of the whole case.

Then, as to the instruction which the court gave of its own motion, it is self-contradictory. It tells the jury that the check was valid for one continuous passage, and yet, it tells them that two men can ride on it, one succeeding the other at a point on the line of continuous passage. In other words it makes the words "continuous passage," on the face of the check refer to a continuous passage, of the defendant's trains, or of the check, and not to a continuous passage of the passenger to whom it is issued. This, we take it, is not the meaning of the words. If this were the meaning, as many men could station themselves along the defendant's line, as there are stopping places between the point where such check is issued to the passenger, and the point for which the ticket has been purchased. The first holder of the

check can get off at the first stopping place with his baggage, and hand the check to the man there in waiting, who may repeat the operation; and so on, from man to man, until the whole transit is completed; in the course of which, fifty different passengers may be carried over fifty segments of the route, and the defendant's baggage men may have been obliged to handle baggage a hundred times. The continuous passage referred to in the check is the continuous passage of the person to whom it was first issued, and of no other person; and this person cannot without the consent of the carrier, introduce another person in his stead. The giving of this instruction then, was error. The judgment must be reversed. As the undisputed facts of the case show that the plaintiff has no right of action, we shall not remand the cause, but judgment will be rendered here for the defendant. It is so ordered. All the judges concur.

Continuous Passages.—It is well settled that where a ticket is issued from one point to another, the traveller has no stop-over privilege, but is bound to make a continuous journey to the point of destination. *Oil Creek, etc., R. Co. v. Clark*, 72 Pa. St. 231; *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457; *Barker v. Coffin*, 31 Barb. 546; *Gale v. Delaware, etc., R. Co.*, 7 Hun. 670; *Terry v. Flushing, etc., R. Co.*, 13 Hun. 359; *Dunphy v. Erie R. Co.*, 10 Jones & Sp. (N. Y.) 128; *Hamilton v. New York, etc., R. Co.*, 51 N. Y. 100; *Stone v. Chicago, etc., R. Co.*, 47 Iowa, 82; *Cheney v. Boston, etc., R. Co.*, 11 Metc. 121; *State v. Overton*, 24 N. J. L. 485; *Drew v. Central Pacific R. Co.*, 51 Cal. 425; *Johnson v. Concord R. Co.*, 46 N. H. 213; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Craig v. Great Western R. Co.*, 24 Upp. Can. Q. B. 504; *Briggs v. Grand Trunk R. Co.*, 24 Upp. Can. Q. B. 510; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432; *Vankirk v. Penna. R. Co.*, 76 Pa. St. 66; *Yorton v. Milwaukee, etc., R. Co.*, 6 Am. & Eng. R. R. Cas. 322; *Hatten v. Railroad Co.*, 13 Am. & Eng. R. R. Cas. 53.

We have departed from our usual rule in publishing the above case, which our readers will observe was decided in an inferior court only. The interest of the subject-matter and the fact that the judge (Seymour Thompson) deciding the case is so eminent an authority upon the topic in hand must constitute our apology for its introduction.

BRADSHAW

v.

SOUTH BOSTON R. R. Co.

(135 *Massachusetts Reports*, 407.)

If a corporation, owning several lines of street cars, has a practice of giving transfer checks to passengers, who, after having ridden on one of its lines, desire to ride on another line, such checks differing in language and color according to the line on which they are to be used, and not being good on any line except the one indicated, and a passenger, who is familiar with this

practice, receives, by the mistake of the conductor of a car on which he has ridden, without reading it, a wrong transfer check, which, upon presentation to the conductor of a car on the second line, is declined on that ground, the passenger cannot, after having refused to pay his fare to the second conductor and been by him expelled from the car, maintain an action against the corporation for such expulsion.

TORT for being expelled from one of the defendant's cars. Trial in the Superior Court, without a jury, before Colburn, J., who reported the case for the determination of this court, in substance as follows:

The defendant is a common carrier of passengers, for hire, owning lines of street cars between South Boston and Boston proper, and, among others, one running over Federal Street Bridge, between Boston and City Point in South Boston by what is called the Bay View route, and another running over Dover Street Bridge between Boston and said City Point by way of Broadway. None of the Dover Street cars run over the Bay View route, and none of the Bay View cars run over Dover Street. When a passenger on the Bay View line wishes to enter the city by way of Dover Street, it is the practice of the defendant, after he has paid his fare and arrived at the proper place for changing cars, to give him a check, which states that it is good, only on the day of its date, for one continuous ride, for Bay View passengers, from Dorchester Avenue to the Providence Depot. When a passenger on the Dover Street line wishes to go to some place in South Boston on the Bay View line, it is the practice, after he has paid his fare and arrived at the proper place for changing cars, for the defendant to give him a check, which states that it is good, only on the day of its date, for one continuous ride from Dorchester Avenue to City Point via Bay View. The upper left quarter and the lower right quarter of the first mentioned checks are colored red, and the corresponding quarters of the other checks are colored yellow. The plaintiff was familiar with the practice above mentioned, and had received and used such checks, but had never read them, though able to read, and had never noticed the difference in the color of the checks.

In the afternoon of May 15, 1881, the plaintiff entered one of the Bay View cars of the defendant at the corner of Eighth Street and Dorchester Street in South Boston, intending to go to the corner of Dover Street and Washington Street in Boston, and thence over the Metropolitan Horse Railroad to some point on that line. He paid his fare on the defendant road, and also sufficient to pay for a transfer check to the Metropolitan road, which he received in due form. He told the conductor that he wished for a check to take him over the Dover Street line, which the conductor promised to give him when they arrived at the proper place for changing cars. At the corner of Dorchester Avenue and Broad-

way he left said car, and, as he left, the conductor handed him the last-named check, by mistake, in place of the first-named. After waiting a short time, a Dover Street car came along, which he entered, and rode as far as the bridge, when the conductor of the car came for his fare, and he tendered him said check. The conductor refused to accept it (though the plaintiff informed him of the circumstances under which he received it, as above stated), and required him to pay a fare or leave the car. The plaintiff refused to pay a fare, and was forced by said conductor to leave the car. No unnecessary force was used.

Upon these facts, the judge ruled that the plaintiff was not entitled to maintain his action, and found for the defendant:

W. Howland for the plaintiff.

J. C. Davis, for the defendant, cited *Townsend v. New York Central & Hudson River R. R.*, 56 N. Y. 295; *Weaver v. Rome, Watertown & Ogdensburg R. R.*, 3 Th. & C. 270; *Petrie v. Pennsylvania R. R.*, 13 Vroom, 449; *Frederick v. Marquette, Houghton & Ontonagon R. R.*, 37 Mich. 342; *Chicago, Burlington & Quincy R. R. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore & Michigan Southern Ry.*, 29 Ohio St. 214; *Yorton v. Milwaukee, Lake Shore & Western Ry.*, 54 Wis. 234.

C. ALLEN, J.—It may be assumed, as the view most favorable to the plaintiff, that the defendant was bound by an implied contract to give him a check showing that he was entitled to travel in the second car, and that it failed to do so; in consequence of which he was forced to leave the second car. It does not appear that the defendant had any rule requiring conductors to eject passengers under such circumstances. We may, however, take notice of the fact that it is usual for passengers to provide themselves with tickets or checks, showing their right to transportation, or else to pay their fare in money. It was the practice for passengers on the defendant's road to receive and use such checks; and the plaintiff intended to conform to this practice.

The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car; or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple and direct way. The checks used upon the defendant's road were transferable, and a proper check, when given, might be lost or stolen, or delivered to some other person. It is no great hardship upon the passenger to put upon him the duty of seeing to it, in the first instance, that he receives and presents to the conductor the proper ticket or check; or, if he fails to do this, to leave him

to his remedy against the company for a breach of its contract. Otherwise, the conductor must investigate and determine the question, as best he can, while the car is on its passage. The circumstances would not be favorable for a correct decision in a doubtful case. A wrong decision in favor of the passenger would usually leave the company without remedy for the fare. The passenger disappears at the end of the trip; and, even if it should be ascertained by subsequent inquiry that he had obtained his passage fraudulently, the legal remedy against him would be futile. A railroad company is not expected to give credit for the payment of a single fare. A wrong decision against the passenger, on the other hand, would subject the company to liability in an action at law, and perhaps with substantial damages. The practical result would be, either that the railroad company would find itself obliged in common prudence to carry every passenger who should claim a right to ride in its cars, and thus to submit to frequent frauds, or else, in order to avoid this wrong, to make such stringent rules as greatly to incommode the public, and deprive them of the facilities of transfer from one line to another, which they now enjoy.

It is a reasonable practice to require a passenger to pay his fare, or to show a ticket, check or pass; and, in view of the difficulties above alluded to, it would be unreasonable to hold that a passenger, without such evidence of his right to be carried, might forcibly retain his seat in a car, upon his mere statement that he is entitled to a passage. If the company has agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract; but he is bound to yield, for the time being, to the reasonable practice and requirements of the company, and enforce his rights in a more appropriate way. It is easy to perceive that, in a moment of irritation or excitement, it may be unpleasant to a passenger who has once paid to submit to an additional exaction. But, unless the law holds him to do this, there arises at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of fare. It is more reasonable to hold that, for the time being, the passenger must bear the burden which results from his failure to have a proper ticket. It follows that the plaintiff was where he had no right to be, after his refusal to pay a fare, and that he might properly be ejected from the car.

This decision is in accordance with the principle of the decisions in several other States, as shown by the cases cited for the defend-

ant; and no case has been brought to our attention holding the contrary.

Judgment for the defendant.

Expulsion of Passengers.—As to the right to expel passengers from railroad trains, see generally *Louisville, C. & L. R. Co. v. Sullivan*, and note, *infra*.

LOUISVILLE, C. AND L. R. Co.

v.

SULLIVAN.

(*Advance Case, Kentucky. Feb. 28, 1884.*)

Railroad companies may rightfully eject from their trains any one who refuses to pay his fare, but in the exercise of this right due regard must be had to the physical condition at the time of the person so ejected, and if he is drunk, he is not to be put off in such place as would, on account of his condition, endanger his life or health.

An assignment of error that appellant was not allowed to prove certain facts is insufficient unless it is also alleged that a witness would have stated those facts.

APPEAL from Oldham Circuit Court.

Barnett, French & Harwood for appellant.

Bullock & Beckham for appellee.

LEWIS, J.—This is an action by appellee to recover damages for personal injuries sustained on account of being unlawfully, wrongfully, and by the gross negligence of the conductor of appellant's train of cars, ejected therefrom and exposed to freezing weather while in a helpless condition.

From the evidence it appears that appellant, on the day he was ejected from the train, which was the 25th of December, walked from Cropper's Station, on the line of appellant's road, where he was staying temporarily, to Christiansburg, another station, where he obtained whisky, and, as the evidence satisfactorily shows, became so intoxicated as to stagger when walking, and was in that condition when between three and four o'clock in the afternoon he got on the train for the purpose of returning to the first-named station, distant two and one half miles. That when the train had gone between one half and three fourths of a mile he was approached by the conductor in the baggage car, where he had improperly gone, and requested to pay his fare, which was twenty-five cents, and refusing, or as he says, being unable to do so, the train was stopped, and he was compelled to leave it. He states that when he stepped from the car he fell down upon the snow,

which other witnesses testify was at the time eight or ten inches deep, and remained there until next morning, not remembering what occurred in the mean time. There is some conflict in the testimony as to the precise place the train left him, and also whether he was at the time standing or lying down, one of the witnesses, a brakeman, testifying that he was standing and said to him, "You can kill me if you like." But about one hour and a half afterwards, near the time for the train going towards Christiansburg to pass, and about two hundred and fifty yards towards Cropper's from the place where the conductor testifies he was put off the train, he was discovered by one of the witnesses lying across the track helpless and nearly unconscious, with a quart bottle nearly full of whisky, who pulled him off the track, but being unable to remove him from the place left him.

By reason of his exposure for such length of time to the cold weather, the temperature of which was, as stated by several witnesses, between eight and ten degrees below zero, his feet, hands, shoulder, and parts of his legs and of one arm were frozen, causing intense suffering and confinement for several months, and the necessary amputation of his toes, several of his fingers, and part of his heel.

Judgment having been rendered in accordance with the verdict of the jury for five thousand dollars, the railroad company has appealed and assign various errors.

One of the grounds for a new trial was that the damages assessed by the jury are excessive, and appear to have been given under the influence of prejudice.

As this ground is not assigned as an error it cannot be considered on this appeal. Nor can we consider the fourth assignment, which is that the court erred in overruling the motion for a new trial. For as has been heretofore held, it is too general to raise any question for decision.

The first error assigned is that the court improperly excluded evidence as set forth in the grounds for a new trial.

The first of the grounds thus in general terms referred to in the assignment is, that appellant was not permitted to prove by the conductor that he would not have put appellee off the train if he had known he could not walk, or was mentally or physically in a helpless condition.

Even if the evidence had been relative and competent it cannot be now considered by this court, because counsel having failed to aver that the witness would so testify, it never was in fact passed on by the lower court.

For the same reason this court cannot consider the other ground for a new trial, viz.: That the court refused to allow appellant to prove by appellee that he was a dissipated man, and that he was in the habit of or frequently laid out all night.

The second assignment, is that the court erred in refusing to render a judgment for defendant upon the special verdicts of the jury.

As this as well as the third assignment which refers to the action of the court in giving and refusing instructions to the jury, involved the question of appellee's right to maintain the action at all, we will consider them together..

Instruction No. 1, given at the instance of appellee, is as follows: "Although the jury may believe from the evidence that plaintiff got on defendant's cars to go from Christiansburg to Cropper's Station, and that he had no ticket, and when his fare was demanded he said he had no money, and neither paid his fare nor delivered to the conductor a ticket, yet if they further believe from the evidence that he was then in such a state of intoxication as to render him mentally or physically incapable of taking care of himself, and he was then in such a helpless condition that to put him off said train would necessarily expose him to death, or great danger of being frozen, and that defendant's agents in charge of said train at the time knew plaintiff's helpless condition, and the danger he would be exposed to, being then and there ejected from said train, then they should find for plaintiff such compensatory damages as he may have sustained thereby as were the necessary and proximate results of his having been put off the train, not exceeding \$25,000."

Two instructions were asked by appellant, but as one of them was given so modified as to harmonize with the one given at the instance of appellee, and the one refused is the reverse of it, we need not quote them.

The following facts were found by special verdicts of the jury:

1. That though requested, appellant, while on the train, refused to either pay his fare or deliver to the conductor his ticket.

2. He was at the time intoxicated and in such a helpless condition as to be incapable of taking care of himself, and the conductor knew it when he put him off.

3. The conductor, in ejecting him from the train, used no more force than was necessary for that purpose.

From the facts found by the jury, and the evidence in the case, it is clear that even slight diligence and care on the part of the conductor would have enabled him to prevent the injury done to appellant.

It is clear also that the act of the conductor was within the scope and in the course of his general authority, and hence appellant must be held responsible for whatever liability attaches thereto.

It being thus established that at the time appellee was put off the train he was himself a trespasser, and that the calamity which befell him was brought on, in part at least, by his own conduct

in getting drunk, the question that arises is whether the act of the conductor is to be held in law, as it is in fact, gross negligence for which appellant may be held liable.

The right generally of railroad companies to put off their trains persons who refuse to pay their fare when requested by the conductor may be conceded. But does it follow that this right may be exercised in such manner, under such circumstances, or against a person in such mental or physical condition as that death or serious bodily harm will necessarily or even probably result from putting him off?

It is true that appellee by refusing to pay his fare became technically a trespasser. But it is well settled that a party may in some cases recover for the gross negligence of another, notwithstanding he may have been a trespasser upon the rights of the other at the time he received the injury.

“Negligence or misconduct on the part of the plaintiff does not prevent him from recovering damages in those cases where his negligence or misconduct has not been the immediate co-operating cause of the injury he complains of.” 1 Addison on Torts, 495. The rule by which to determine the right of recovery in such cases is that when the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff is remote, consisting of some act or omission not occurring at the time of the injury, the action can be maintained although the plaintiff is not without fault himself. *Kerwhacker v. C., C. & C. R. R. Co.*, 3 Ohio St. 172; *Isbel v. New York & N. H. R. Co.*, 27 Conn. 393. And by this court it has been repeatedly held that although the plaintiff suing for an injury resulting from gross negligence may have himself been guilty of negligence, nevertheless, if the injury might have been avoided by the proper care of the defendant, such co-operating negligence of the plaintiff will not exonerate the defendant.

In the able opinion delivered in a leading case of *Isbel v. The New York & N. H. R. R. Co.*, just cited, the court said: “A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demands this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Premature remedies must therefore always be proportioned to the case in its peculiar circumstances—to the imminency of the danger, the evil to be avoided, and the means at hand to avoid it. And herein is no novel or strange doctrine of the law, it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. A boy enters

a door yard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull-dog; still he is a trespasser, and if he had kept away would have received no hurt. Nevertheless is not the owner of the dog liable? A person is hunting in the woods of, or crossing a pasture of, his neighbor and is wounded by a concealed gun. Is he in such case remediless because he is there without consent? Or an intoxicated man is lying in the travelled part of a highway; helpless if not unconscious; must I not use care to avoid him? May I say that he has no right to incumber the highway, and therefore carelessly continue my progress regardless of consequences? Or if such man has taken refuge in a field of grass, or hedge of bushes; may the owner of the field, knowing the fact, continue to mow on, or fell trees as if it was not so? Or if the intoxicated man has entered a private lane or by-way, and will be run over if the owner does not stop his team, which is passing through it, must he not stop them? It must be so that an unnecessary injury negligently inflicted in these and kindred cases is wrong and therefore unlawful. If assailed, a man may do what is necessary to defend himself against the assault, but he may not become himself the assailant. He may defend his property, but he may not in doing it make use of unnecessary violence, and cease to use all care as to the injury he inflicts. The duties which men owe to each other in society are mutual and reciprocal, and faulty conduct on the part of another never absolves one from their obligations, though such conduct may materially affect the application of the rule by which this duty is to be determined in the particular instance."

The principles laid down and the illustrations given in the opinion first quoted from are correct and applicable to this case.

In the case of *Johnson v. the C., R. I. & P. R. Co.*, 58 Iowa, 348, the plaintiff was removed from the waiting-room of a railroad station by the agent of the defendant. His shoulder was dislocated either from a fall from the door, out of which the agent pushed him, or by a fall after he landed on the platform. The plaintiff was not in the waiting-room awaiting an outgoing train to take passage, or for any other purpose for which a waiting-room at a station is kept open to the public. He had no right to remain there after being requested by the agent to leave it. He refused the request to leave before any violence was used towards him, and was drunk and disorderly. In the opinion delivered in that case the court said: "The rule that carriers of passengers are liable for the neglect or wrongful acts of their servants or employees does not always depend upon the fact that the carrier owes a duty or is under some obligations to the party injured. When a person is found upon a train who refuses to pay his fare the company owes him no duty, and he may be removed; but if in removing him he is wrongfully injured by personal violence, or by

being thrown from the train when in motion, or the like, he may recover from the company for his injuries. This is no more than the application of the ancient rule that if one person came into the dwelling-house of another without right, after requesting him to depart, and his refusal to comply with the request, he may be removed by gently laying hands upon him and using such force as is reasonably necessary to effect the object. But if excessive force be used, the action is a wrongful assault."

The case of *Kline v. C. P. R. R. Co.*, 37 Cal. 400, was where a boy got upon a morning train as it passed his residence with intent to enjoy a free ride for a short distance. The conductor, either by threatening or pushing, caused him to fall from the train while in motion, and a car wheel to run over his leg, crushing it so as to necessitate amputation. The court held that "the conductor doubtless had the right to eject him by force, if force was necessary, but he was bound to exercise the right with ordinary care and prudence, and he had no right to eject him under circumstances which would endanger his personal safety. If the train was going at a speed which would render it unsafe for him to leave the car, it was the duty of the conductor, if determined to put him off, to stop or slow up sufficiently to allow him to descend in safety, by the exercise of reasonable care and prudence on his part. Although his entry upon the car was a trespass, yet, if it was an accomplished fact, before the conductor attempted to interfere, his entry did not directly conduce to the injury which he sustained, but was, in the sense of the rule under consideration, only its remote cause, and did not, therefore, absolve the conductor from the duty of observing reasonable care and prudence in putting him off the train.

In the case of *Wigmire v. Wolf*, 52 Iowa, 533, the plaintiff's intestate, Dunn, was an habitual frequenter of the saloon kept by the defendant, who sold him intoxicating liquor, which caused him to drink, and while he was in a state of helpless intoxication, the defendant expelled him from his saloon at a late hour of the night, and Dunn, being thus intoxicated, died of cold and exposure. The court held: "If it should be conceded that Dunn contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care. If after the company should be guilty of negligence, whereby the exposed person should be injured, the negligence of the company would be deemed the proximate cause of the injury. So if the defendant negligently subjected Dunn to exposure to his injury, knowing that he was unconscious, or even helpless, the defendant cannot escape liability on account of Dunn's negligence

prior to the wrongful acts, whereby Dunn was subjected to exposure, however great Dunn's negligence may have been in allowing himself to become intoxicated."

That case is so nearly like this that the reasoning which may be applied to one is applicable to the other, and if correct, as we believe it is, it must be regarded decisive of the question involved here.

If in defence of either person or property a party uses more force than is necessary, the defence degenerates into aggression, and the party becomes a wrongdoer, and liable for the unnecessary injury inflicted, whether done maliciously or negligently. The language of the law is *molliter manus imposuit*.

We do not understand this injunction as applying merely to the character of weapons that may be used in defence of the person, or the degree of propelling force applied in removing a trespasser from a party's premises. But it is intended to apply and govern as to the manner, the circumstances and condition of the parties in which the right to protect one's person or property may be exercised. Thus force might be applied legally to a strong vigorous man, when the danger to the person was imminent, or the value of property or rights threatened or invaded great, which would become wanton cruelty, or gross negligence in the case of a child, imbecile or helpless drunken man.

In this case, if the evidence and the special findings of the jury are to be believed, appellant's agent and employee, if he did not use more actual force than was necessary to expel appellee from the train, did use it under circumstances and at a time when the consequences ordinarily would be as injurious as when in an attempt to remove a trespasser from his dwelling-house the owner should shove him from an upper story, or lead him into a pitfall or well, or when a person is pushed off a fast moving train. In every such case the party would be justly chargeable with negligence, and held liable therefor, the fault or negligence of the person injured being remote, and therefore affording no defence to an action brought for the injury resulting.

Applying these principles, which are in accordance with the authorities and sustained by the necessities of society and the analogies of the law, the instruction of the court which we have quoted was right, and it was not error to overrule the motion to render judgment for appellant upon the findings of the jury.

The judgment is affirmed.

Right to Expel Passenger for Non-Payment of Fare.—It is well settled that a railroad company may expel from its trains a passenger who declines to pay his fare. *Haley v. Chicago, etc., R. Co.*, 21 Iowa, 15; *Chicago, etc., R. Co. v. Boger*, 1 Bradw. App. 472; *O'Brien v. Boston, etc., R. Co.*, 15 Gray, 20; *Ohio, etc., R. R. Co. v. Muhling*, 30 Ill. 9; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Lillis v. St. Louis, etc., R. R. Co.*, 64 Mo. 464; *O'Brien v. N. Y.*

Cent. & H. R. R. Co., 1 Am. & Eng. R. R. Cas. 259; **Garrett v. Louisville, etc., R. Co.**, 3 Am. & Eng. R. R. Cas. 416; **Skillman v. Cincinnati, etc., R. Co.**, 13 Am. & Eng. R. R. Cas. 31; **Bradshaw v. South Boston R. R. Co.**, *supra*.

Where Expulsion may Take Place.—Independent of statute, there is no obligation upon the part of a railroad company to expel a passenger who refuses to pay fare at a station. He may be expelled at a point between stations. A wanton injury cannot, however, be inflicted in thus expelling him. **Haley v. Chicago, etc., R. Co.**, 21 Iowa, 15; **Great Western R. Co. v. Miller**, 19 Mich. 305; **Fulton v. Grand Trunk R. Co.**, 17 Upp. Can. Q. B. 428; **O'Brien v. New York C. & H. R. R. Co.**, 1 Am. & Eng. R. R. Cas. 259; **Skillman v. Cincinnati, S. & C. R. Co.**, 13 Am. & Eng. R. R. Cas. 31.

Trespassers.—Trespassers may be expelled anywhere, provided no wanton injury is done them. **Chicago, etc., R. Co. v. Boger**, 1 Bradw. 472; **Lillis v. St. Louis, etc., R. Co.**, 64 Mo. 464.

But see **Chicago, etc., R. Co. v. Roberts**, 40 Ill. 503; **Chicago, etc., R. Co. v. Peacock**, 48 Ill. 253.

Measure of Damages.—As to the measure of damages where a person is ejected from a train at any place other than a regular station. **Chicago, etc., R. Co. v. Parks**, 18 Ill. 460; **Terre Haute R. Co. v. Vanatta**, 21 Ill. 188; **Chicago, etc., R. Co. v. Flagg**, 43 Ill. 364; **Chicago, etc., R. Co. v. Roberts**, 40 Ill. 503; **Chicago, etc., R. Co. v. Peacock**, 48 Ill. 253; **Illinois, etc., R. Co. v. Johnson**, 67 Ill. 812; **Illinois, etc., R. Co. v. Cunningham**, 67 Ill. 816; **Indianapolis, etc., R. Co. v. Milligan**, 50 Ind. 892; **Toledo, etc., R. Co. v. McDonough**, 53 Ind. 289; **Quigley v. Central Pac. R. Co.**, 11 Nev. 350; **Graham v. Pacific R. Co.**, 66 Mo. 536; **Huntsman v. Great Western R. Co.**, 20 Upp. Can. Q. B. 24; **L. E. & W. R. Co. v. Fixe**, 11 Am. & Eng. R. R. Cas. 109.

HENDERSON

v.

LOUISVILLE, ETC., R. Co.

(*Advance Case, U. S. Circuit Court, E. D. Louisiana. April 9, 1884.*)

A railroad company is not responsible for the loss of a parcel of valuables carried in the hand of a passenger, falling out of an open window without any fault of the servants of the company, although upon notice and demand they refused to stop the train to permit the recovery of the lost articles until it arrived at the next usual and advertised station.

O. B. Sansum and E. Sanbourin for plaintiff.

Bayne & Denegre for defendant.

BILLINGS, J.—The petition sets forth that the plaintiff was a passenger upon the defendant's road, in one of its coaches forming a part of one of its regular trains, which was run by a conductor by it appointed, from the town of Pass Christian to the city of New Orleans, and lawfully had with her a "certain leathern bag," which contained money, diamonds and jewelry, in all the value of \$9875, carrying said bag in her hand; that while the plaintiff

was closing a window of the car in which she was riding, to stop a fierce current of air which came in upon her, "said leathern bag and its contents, by some cause unknown to the plaintiff, accidentally fell from her hand through said open window and upon defendant's road;" that thereupon the plaintiff communicated to the said conductor of the defendant's the loss of said bag and the value of its contents, and requested him to stop said train that she might recover the same, which he refused to do, but carried the plaintiff on for a distance of three miles to Bay St. Louis, from which place she dispatched a trusty person back to the place where said bag and its contents were dropped, but before said person could arrive at said place the said bag had been stolen and carried away, whereby the plaintiff lost the value of said contents, for which the plaintiff prays judgment.

The question of law presented is, was the defendant, who was a common carrier of goods and persons, to wit, a railroad company, responsible for the loss of a parcel of valuables carried in the hand of a passenger falling out of an open window without any fault of the carrier, for the reason that upon notice and demand it did not stop a train to recover the parcel until the train arrived at one of the usual and advertised stations.

The propositions of law which the plaintiff must maintain in order to allow an affirmative answer to this question are two. 1. That the plaintiff had a right to take into the car with her the bag and its contents, and to carry the same in her hand or in some other way under her personal supervision and in her personal custody; and 2. That the defendants entered into some further contract with reference to the carriage and safety of the same which involved liability in case of loss or separation without fault on defendant's part, from the plaintiff's possession. The first proposition is correct; the second cannot be maintained. The plaintiff, considering the well-known habits and requirements of passengers in the United States at this day had an undoubted right to take with her her jewelry and money in her journey from her summer to her winter residence. They were in bulk and character such that they could be taken into the car without any inconvenience either to the defendants or the other passengers. Indeed, they were of such bulk and character as to altogether escape observation. But this was simply a permission; there was no obligation, except as connected with the carrying of the plaintiff. If the loss had arisen in consequence of the defendant's failure, diligently and with proper skill to carry the plaintiff, a different question would have arisen. For in that case there would have been a violation of a contract and the sole inquiry would have been as to whether the loss of the valuables carried in the hand could have been grounds for the recovery of damage. But the case shows that the plaintiff was in all things, so far as related to herself, diligently and with proper

skill, transported from the point to the point mentioned in her passage. There remains, then, the question whether the defendants assume any responsibility with reference to the valuables other than that the plaintiff herself should be carried, and that the valuables should not be interfered with by any act or fault of theirs. This contract was completely performed. Notwithstanding this performance the plaintiff, through her power of locomotion and not at all through any fault or act of defendant, found herself separated from her valuables, and the force of plaintiff's argument was that the defendant was under obligation to stop the train to enable her to recover them. There was no contract to do anything at all toward recovery, unless there had been some violation of the understanding to carry, and there had been none. It is as if the plaintiff had, by a theft or other casualty, preceding her journey been separated from these same valuables, and recognizing them lying on the defendant's road, insisted that the conductor should stop the train in order to allow her to regain them. The appeal was to a party who was under no legal obligation to aid in the recapture, and stood upon grounds of kindness and Christian charity to be decided by the person appealed to by reference to moral and not legal considerations, and if refused caused *damnum absque injuria*.

In all the actions against the common carrier for nonfeasance, whether the action is in *assumpsit* or on the case, the gist of the action is the neglect to perform a duty which is created and measured by the contract. Beyond or outside of the contract the carrier is under no greater obligation to the shipper of passengers than is the rest of the community. The doctrine, "*Sic utere tuo ut alienum non lædas*," can never have the effect to transfer from one contracting party to another a risk of injury or loss which had by the plain words or unmistakable implication of the contract itself been lodged. In such a case the party who had assumed the responsibility must bear the damage or loss. Here the bag and its contents, so far as they depended upon its custody and location within the car, were by the contract of passage to be retained in the care of the plaintiff, and any disposition of them by her which turned out to be unwise or simply unfortunate and resulted in loss, concerned the plaintiff alone. So far as relates to the effect of those circumstances set forth in the petition, the continuance of plaintiff's possession of the bag and its contents, and their restoration to her possession after it had been interrupted, were matters which the plaintiff herself undertook to care for to the exclusion of responsibility on the part of defendant. In this respect the defendant violated no obligation, for none existed.

The exception must be maintained and the petition dismissed.

Railroad Company not Liable as Common Carrier for Baggage in Passenger's Custody.—The law seems to be well settled that a railroad com-

pany cannot be held liable as a common carrier for hand baggage in the personal custody of a passenger. *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Bergheim v. Great Eastern R. R. Co.*, 17 Am. L. Reg. 779; *Gleason v. Goodrich Trans. Co.*, 32 Wisc. 85; *Kinsley v. Lake Shore, etc., R. Co.*, 19 Alb. L. J. 113; *American Steamship Co. v. Bryan*, 88 Pa. St. 446; *Tower v. Utica, etc., R. Co.*, 7 Hill, 47; *Weeks v. New York, etc., R. Co.*, 72 N. Y. 50; *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275; *The R. E. Lee*, 2 Abb. C. Ct. 49; *Williams v. Keokuk, etc., Packet Co.*, 3 Cent. L. J. 400; *Del Valle v. Steamer Richmond*, 27 La. Ann. 90; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Monr. 302; *Cohen v. Frost*, 2 Duer, 385.

When Discharged from Liability.—But in order to relieve the company from liability it must distinctly appear that the passenger has assumed custody of the article in question. *Le Conteur v. London, etc., Ry. Co.*, L. R. 1 Q. B. 54; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. (N. S.) 229; *Mudgett v. Bay State Steamboat*, 1 Daly, 151; *Gore v. Norwich, etc., Transp. Co.*, 2 Daly, 254; *Walsh v. Steamboat H. M. Wright*, 1 Newl. Adm. 494; *Richards v. London, etc., R. Co.*, 7 C. B. 339.

Liable for Negligence.—In any event a railroad company is responsible for any negligence on the part of its servants occasioning a loss, though the property was in the exclusive custody of the passenger. *Kinsley v. Lake Shore, etc., R. Co.*, 125 Mass. 54; *Williams v. Keokuk, etc., R. Co.*, 3 Cent. L. J. 400; *American Steamship Co. v. Bryan*, 88 Pa. St. 446.

Jewelry and Precious Stones not Baggage.—Jewelry and precious stones of large value are not accounted as personal baggage. *Steers v. Liverpool, etc., R. Co.*, 57 N. Y. 1; *Bell v. Drew*, 1 E. D. Smith, 59; *Cincinnati R. Co. v. Marcus*, 38 Ill. 219; *Cadwallader v. Grand Trunk R. Co.*, 9 Lower Can. Rep. 169; *Michigan, etc., R. Co. v. Carrow*, 73 Ill. 348; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *The Ionic*, 5 Blatchf. 538; *Walsh v. Steamer H. M. Wright*, 1 Newl. Adm. 494; *Torpey v. Williams*, 3 Daly, 162; *Hillman v. Holladay*, 1 Woolw. 365.

PEOPLE ex rel. BERNARD et al.

v.

CHEESEMAN et al.

(*Advance Case, Colorado. May 2, 1884.*)

Where the articles of incorporation of an intended company declare that the purpose of the company is to locate, build, own and maintain a union depot for railroads, and to locate, build, own and maintain as many different lines of railroad from said depot as may be necessary for the use and accommodation of different railroad companies, said articles will not be held to intend to create a regular railroad company.

A substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to do so, in any material particular, is ground for the impeachment of corporate existence.

Where a statute provides that a corporation shall not exist to exceed 20 years, but the articles of incorporation provide for an existence of 50 years, *held*, that the corporation may exist for 20 years.

It is not necessary that the acknowledgment of articles of incorporation should show that the persons acknowledging were personally known to the acknowledging officer to be the persons who executed the articles.

ERROR to the District Court of Arapahoe County.

W. A. Hardenbrook and J. A. J. Page, for plaintiffs in error.

G. M. Dunn, Teller & Orahood, B. M. Hughes, and C. J. Hughes, for defendants in error.

HELM, J.—Relators, in the name of the people, seek by an action in the nature of quo warranto to directly challenge the corporate existence of "The Union Depot & R. R. Co." Their theory is that respondents, under that name, wrongfully usurped the privileges and franchises of a corporation; that respondent's attempted organization of the company was void ab initio, by reason of a failure to comply with the precedent requirements of our general incorporation act. The action is brought under chapter 28 of the Code of 1883.

It is somewhat doubtful if relators are in position to maintain the same in the name of the people or otherwise, giving the code provisions the interpretation most favorable to them. But we prefer to base our determination of this proceeding in error upon other grounds. Some doubt seems to exist in the minds of counsel as to the purposes for which the corporation was attempted to be organized. This uncertainty grows out of the language used in the articles of incorporation. Respondents therein declare their intention to create a company "for the purpose of locating, building, owning, and maintaining a union depot for railroads in the city of Denver, Arapahoe county, in said State, and for the location, building, owning, and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers."

Does this language indicate an attempt to create an ordinary railroad company under our laws? We think not. The primary and principal design evidently was to build and maintain a union depot. Various lines of railroad extended to the city; they came in from different directions, and discharged freight and passengers at different points. To successfully "maintain" a union depot, and thereby accomplish the purpose of the enterprise, it was of course necessary to connect the same with the several termini of the roads within the city. Incidental, therefore, to the main adventure, was the construction and keeping in repair of lines of track to make these connections. Had the articles of incorporation announced a purpose to build and maintain a union depot, and connect the same by lines of track with the different railroads

centering in Denver, the same intention would in our judgment have been expressed, and the same end attained. The language of the articles expressly excludes the idea that the Union Depot Company intended to operate the "lines of railroad" they constructed; for these lines were to be built and maintained for the accommodation and use of the different railroads, etc. It is safe to say that the legislature, in the portion of the incorporation act above mentioned, were not providing for such incidental aids to another enterprise as this; and it is also a fair conclusion from the language used, and the evident purpose expressed in the articles of incorporation, that respondents had no intention of engaging in the business of constructing or operating a railroad under said statute. It is true that the word "railroad" is used in the corporate name, and the term of existence is fixed at 50 years; it is also true that by the substituted articles of incorporation the number of incorporators was increased from four to five. These facts would cast some doubt upon the subject if there was room for uncertainty; but, as above indicated, we think there is no ground for reasonable doubt as to what respondents' purposes really were, and it is unnecessary for us to speculate upon their reasons for preparing the articles of incorporation in the manner they did.

The conclusion that they were not attempting to engage in a railroad enterprise disposes of many of the objections presented by relators; it also greatly simplifies our consideration of the remaining questions. An attempt was made by respondents to organize an ordinary private corporation for a lawful purpose under our statutes authorizing the same. Did they succeed? As already suggested, the grounds of attack relied upon in this case are errors in the attempt to comply with the specific requirements of the statute in creating the corporations. No effort is made to have a forfeiture of its franchises declared on account of acts or omissions occurring subsequent to its organization. We have no doubt but that in this State a substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and that a failure to comply therewith in any material particular is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority.

Twelve different alleged defects are named and discussed at length in the briefs. Many of these, however, are already disposed of, and we only deem it important to consider two of the remainder.

Was the fact that the articles of incorporation provide for an existence of 50 years fatal? Section 238 of the General Statutes requires that these articles shall state, among other things, "the term of existence, not to exceed twenty years." The defect here suggested is not an omission to insert something required. Re-

spondents comply with the statutes by declaring the term of existence. As to the length of this term they ask more than the law allows. In the face of a restriction to 20 years they assume the right to act for 50. This statutory provision as to time may, we think, properly be regarded as a limitation; and we are of opinion that the irregularity is not such a non-compliance with law as operated to prevent the corporation from coming into existence. It cannot without renewal live for 50 years; but, so far as this objection is concerned, it may exercise the rights and privileges of a corporation in carrying on the business intended for the period of 20 years.

Was there a fatal defect in the certificate of acknowledgment of the articles of incorporation? This certificate is as follows:

"State of Colorado, Arapahoe county, ss.: I, William B. Tebbets, a notary public within and for the county of Arapahoe and State of Colorado, do hereby certify that on the twenty-fourth day of November, A.D. 1879, personally appeared before me the persons whose names are signed to the foregoing articles of association, namely, Walter S. Cheeseman, Bela M. Hughes, D. C. Dodge, A. A. Egbert, and J. F. Welborn, and they each of them acknowledged that they had signed the foregoing articles of association for the purposes therein set forth. In testimony whereof, I have hereunto set my hand and affixed my official seal this, the day and year aforesaid.

"[Seal.]

WILLIAM B. TEBBETS, Notary Public."

The specific objection to this certificate is that it is not stated therein that "the individuals who acknowledged the same were personally known to the officer who took the acknowledgment, or proven to him to be the persons who executed the certificate." Were this omission in the certificate of an acknowledgment to a deed conveying real estate, we might be constrained to hold such certificate defective. Such is the conclusion reached under a statute identical with our section 212, which provides for the acknowledgment of instruments relating to realty. *Shephard v. Carriel*, 19 Ill. 319. But the statute under which the certificate of acknowledgment to these articles of incorporation was made, contains no such specific requirement as said section 212; it simply declares that the acknowledgment shall be "before some officer authorized to take the acknowledgment of deeds." The declaration that the same officer shall officiate does not necessarily imply that he must certify to precisely the same matters in both instances. The provision requiring the officer to state that the individual subscribing and the one acknowledging are personally known by him to be identical, was inserted for the purpose of preventing one individual from personating another in the execution of instruments relating to real estate. As will be observed,

the notary public certifies that the persons whose names are signed to the articles of incorporation under consideration personally appeared before him. In early times this would have been ample in the certificate to an acknowledgment of a deed to realty, and we are satisfied that it is a sufficient compliance with the incorporation statute upon the subject.

The judgment of the district court will be affirmed.

EMERSON

v.

NEW YORK AND NEW ENGLAND R. R. Co.

(*Advance Case, Rhode Island. July 12, 1884.*)

The H., P. & F. R. R. Co., the road whereof was mortgaged, issued certain shares of preferred stock. Subsequently the company defaulted in payment of interest on the mortgage, whereupon the directors voted to surrender the road to the mortgage trustees, the net earnings to be applied first on account of the mortgages in the manner specified in the mortgage deed of trust, and the surplus to be applied to the payment of unsecured creditors. Subsequently the company made a perpetual lease and grant of its road and franchises to the B., H. & E. Co., who subsequently conveyed to the B., H. & E. R. Co. These transfers were sanctioned by legislative enactment. Subsequently the B., H. & E. R. Co. mortgaged its road and defaulted in payment of interest. The mortgagees foreclosed, bought in at the foreclosure sale, and formed the N. Y. & N. E. R. Co. The trustees in the original mortgage then leased the road to the N. Y. & N. E. R. Co. Certain stockholders of the H., P. & F. R. Co. filed a bill to set aside the above agreement and lease on the ground of fraud and ultra vires. The bill was dismissed on the ground of laches. A preferred stockholder having subsequently filed another bill alleging that the trustees in the original mortgage had realized from their lease more than enough to pay the interest on the mortgage and seeking to have the surplus applied to arrears of dividends on preferred stock:

Held, that in order to establish his right to relief the complainant was bound to show that the conveyance by the H., P. & F. R. R. Co. was void, and that having been a party to the former suit wherein that question was raised and adjudicated, he was precluded from again raising the point, and that the bill must be dismissed.

BILL in Equity to establish a right to certain dividends and for an injunction.

Lucien Birdseye & Charles H. Parkhurst for complainant.

William P. Sheffield, Simeon E. Baldwin, W. C. Loring, H. E. Bolles & Frank S. Arnold for respondents.

CARPENTER, J.—This is a bill in equity brought by a holder of preferred stock in the Hartford, Providence & Fishkill R. R. Co., on behalf of himself and all other such stockholders against

that company, Stephen Harris and others, directors in that company, the Boston, Hartford & Erie R. R. Co., the New York & New England R. R. Co. and Henry Lippitt and others, trustees under mortgages from the Hartford, Providence & Fishkill R. R. Co. The bill was filed March 28, 1883, and alleges the formation of the Hartford, Providence & Fishkill R. R. Co. by the union under legislative authority of two corporations, one in Rhode Island and one in Connecticut; that bonds were issued by the united company secured by mortgages on that part of the road lying in Rhode Island, which mortgages were made to trustees to whom the respondent Lippitt and others are successors. It then sets out the issue of the preferred stock of the company. The details of this issue of stock are not necessary here to be repeated, as they are stated in full in the report of the case of *Taft, Trustee, v. Hartford, Providence & Fishkill R. R. Co.*, 8 R. I. 310. The bill then goes on to allege that prior to January 1, 1858, the company became insolvent, and in that month the directors voted to surrender the road to the mortgage trustees to hold to the uses specified in the mortgages, and that whenever there should be any surplus of net earnings it should be applied to the payment of unsecured creditors; that immediately thereafter possession of the road was delivered accordingly to the trustees and that they and their successors have ever since retained possession of the same; that in August, 1863, the company in pursuance of an agreement previously made, undertook and pretended to make and deliver a certain lease and deed of grant purporting to convey the whole of the railroad and franchise of the company to the Boston, Hartford & Erie R. R. Co., which agreement, lease and deed and the resolutions and orders in pursuance of which they were pretendedly executed were inoperative and void as against the complainant, these resolutions, agreement, lease and deed being the same which are set out and described in the dissenting opinion of Mr. Justice Potter in *Boston and Providence Railroad Corporation v. New York & New England R. R. Co.*, 13 R. I. 260, 270; s. c., 2 Am. & Eng. R. R. Cas. 300; that the respondent the New York & New England R. R. Co. claims by certain mesne conveyances to have succeeded to the right and title of the grantee in the said pretended lease and deed; that since October, 1878, the mortgage trustees have let and demised that part of the railroad lying in Rhode Island to the New York & New England R. R. Co. at an agreed rent which was for a long time duly paid by the company to the trustees; that the trustees have paid the interest on the bonds secured by their mortgages and now have on hand a surplus of above \$82,000 in money, the proceeds of the earnings; that all the debts of the Hartford, Providence & Fishkill R. R. Co. have been paid and the surplus in the hands of the trustees is applicable to the payment of arrears

of dividends on the preferred stock, and all the future earnings of the road ought to be so applied; that the complainant is the owner of one hundred shares of the preferred stock; that the New York & New England R. R. Co., claiming to be the owner of the equity of redemption of the said railroad, is taking proceedings to compel the mortgage trustees to pay over to them the surplus of money as above and to transfer to them possession of the railroad; that all transfers of the railroad and franchise have been with actual notice of the claims of complainant and all decrees and laws touching such transfers have saved the rights of the preferred stockholders; that it was only after October 18, 1878, that the railroad began to earn any money beyond what was sufficient to pay operating expenses and interest on bonds.

The prayer is for a decree that the complainant is entitled to ten per centum dividends from October, 1855, and interest thereon, and to have the same paid out of the surplus in the hands of the mortgage trustees and is entitled to have the road operated so that the future earnings shall be applied in the same way; and for an injunction against any transfer of the surplus fund or of the railroad to the New York & New England R. R. Co. and for other incidental relief and for general relief.

The New York & New England R. R. Co. pleads in bar the adjudication in *Boston & Providence Railroad Corporation v. New York & New England R. R. Co.*, 13 R. I. 260; s. c., 2 Am. & Eng. R. R. Cas. 300. There is also another plea, an answer denying fraud and a general demurrer to the residue of the bill for want of equity and for laches.

The proofs set out very fully the whole history of this railroad property and of the corporations which have successively owned it, so far as that history has reference to this property. The case has also been argued elaborately and with much learning. To the greater part of the evidence, however, and to much of the argument we do not find it necessary to advert, since, as it seems to us, the whole controversy must be decided upon a single point.

The complainant, as we will assume, is the owner of certain shares of the preferred and guaranteed stock of the Hartford, Providence & Fishkill R. R. Co. He therefore had rights against the company and its property which partook of those of a stockholder and of a creditor. As a stockholder he had rights to dividends and to repayment of the principal of his stock in preference to any of the ordinary stockholders. As a creditor he was entitled to be paid the amount of his debt in the same manner as other creditors, but with no preference over them. *Branch v. Jesup*, 16 Otto, 468; *St. John v. The Erie Railway Co.*, 10 Blatch. 271; also 22 Wall. 136; *Warren v. King*, 108 U. S. 389. It will not be claimed that he had any lien on the present or future property of his debtor. His only right was to dividends and to payment out of

such property as might belong to his debtor at the time the several sums due to him should become payable; and this right he holds unimpaired at the present time.

Under this state of the case the complainant demands payment of certain sums due to him out of the property and its proceeds which were conveyed to the Boston, Hartford & Erie R. R. Co. by the deed and lease of August, 1863. In order that he may prevail it is necessary for him to show that the property still belongs to the Hartford, Providence & Fishkill R. R. Co., or that it is to be so treated and considered for the purposes of this case. But the conveyance of the property is absolute on its face and conveys absolutely all the equity of redemption of the grantor. It is necessary, therefore, for the complainant to establish the proposition that the conveyance is void. But the question whether this conveyance can now be set aside was argued and determined in *Boston, etc., R. R. v. New York, etc. R. R.*, 13 R. I. 260; s. c., 2 Am. & Eng. R. R. Cas. 300. The holders of preferred stock were complainants in that case, and we can see no escape from the conclusion that the judgment in that case binds the parties here and is decisive against the demand of this bill.

The complainant contends, with much earnestness, that all the decrees of courts and legislative acts which have from time to time become necessary in order to authorize the successive transfers of this property since the conveyance of August, 1863, have notified all purchasers of the existence of his rights and have expressly saved such rights. Undoubtedly such is the fact; but those decrees and acts have at no time purported to enlarge these rights or to extend the time within which they might effectually be demanded, still less have they purported to establish a specific lien upon the property authorized to be conveyed. Such extension of rights or saving of remedy, had such existed, might have been set up in the former suit.

The complainant also insists that there was not until October, 1878, any accumulation of surplus profits out of which his demand for dividends could be satisfied, and that therefore he was guilty of no laches in delaying his suit until such surplus had arisen. This argument might have been urged with added force at the argument of the former bill. Indeed, a question precisely similar was considered in that case. The argument for the complainants was, that until the mortgage bonds were due they could not have brought that bill to redeem the mortgages and obtain possession of the railroad. We may well adopt the language of the court in disposing of that argument, and say, that although complainant could not have brought this bill until after October, 1878, for the purpose of charging the fund in the hands of the mortgage trustees with a trust for the payment of his dividends, yet he "could have objected to and settled the validity of the sale which disposed of all the cor-

porate property and business, and thereby have determined the real question in this case before the rights of other parties had intervened."

In considering, also the demurrer on the ground of laches the former adjudication is strongly and directly in point as an authority. We are not prepared to come to a different conclusion upon facts which seem to us to be substantially identical. The remaining plea is not necessary to be considered, and the relief sought against the respondents other than the New York & New England R. R. Co. is auxiliary to the relief sought against that company. In fact, as we find ourselves obliged to conclude, the equity of the whole bill rests upon the assertion that the conveyance of August, 1863, was void as against the complainant. The negative of this assertion having been conclusively found against him in the former suit his bill cannot be maintained.

See *Chaffee v. Rutland R. R. Co.*, and note *infra*.

CHAFFEE

v.

RUTLAND R. R. CO. AND TRUSTEES.

(55 *Vermont Reports*, 110.)

Two mortgages resting on the R. & B. R. R. Co., it being operated by the trustees of the second mortgage bondholders, a suit pending to foreclose the first mortgage, and during the pending of this suit a charter having been obtained for the defendant company, in the interest of the second mortgage bondholders, the defendant by corporate vote, under the authority of the charter, issued \$4,300,000 of "preferred or guaranteed stock, commonly called preferred guaranteed stock," also \$2,500,000 of common stock, to liquidate the first mortgage bonds and other claims resting on the property. The charter provided that the said guaranteed stock should "be entitled to receive dividends from the earnings and income of the corporation;" that, it "shall pay and shall be liable to pay such dividends;" that, "until declared, interest shall be added to each dividend;" and that no dividend should be paid on the common stock "until a dividend is made on said preferred stock." The defendant having issued certificates of "scrip dividends" in "settlement of dividends" on the said preferred stock, in an action of assumpsit to recover the amount of some of said certificates. *Held*, that a preferred stockholder is not a creditor; that a creditor's lien is prior to the right of a stockholder; that a right to a dividend is not a debt; that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; that a stockholder is not entitled to any dividend of the profits until all the debts are paid; that the stock and property of a corporation is a trust fund pledged for the payment of its debts; and that there is no right to declare a dividend until there is a fund from which it can properly be made.

But, the company having issued the certificates without objection by any stockholder or creditor, which certificates were convertible into the company's bonds on demand or at the option of the holder, the company having converted all or nearly all of the certificates into bonds, except the plaintiff's, having ratified them, and never having denied their validity, and having so acted that it is estopped to deny their validity, general assumpsit, will lie to recover the amount of the certificates, the company on demand having refused both to convert them into bonds or to pay them; and this is so although at the time the scrip dividends were issued the net earnings were insufficient to pay them, the current expenses, and the floating debt of the company, said debt having been very largely reduced when this suit was brought, and it not appearing that the same treatment of the plaintiff's certificates with the others would have embarrassed the company.

Having issued the certificates, ratified them, and all the other preferred stockholders having received the fruits thereof, the company itself cannot plead its own wrong in defence by showing that they were illegally issued, or that it had no authority to exchange bonds for certificates, it not appearing that this was necessary to protect itself from embarrassment, or creditors from loss.

The plaintiff was a stockholder, and so affected by constructive notice to a certain extent of the acts of the company and its officers, but in fact had no part in what was done; and, hence, stands in no such equal fault as to warrant a denial of remedy.

The certificates ran to the holder, went on the market, were purchased by the plaintiff; and the defendant had always treated him as though an original holder, and the certificates as running to bearer. *Held*, that the plaintiff could sustain the action in his own name; and that it was not a question of negotiability; but how the defendant had treated the certificates, etc.

All the issues of certificates were authorized by nearly, if not entirely, unanimous votes of the corporation, followed by votes of the directors. They were issued from time to time from 1872 to 1875, inclusive. The company never denied but always recognized their validity by its corporate action, the repeated votes of its stockholders and directors, the representations of its officers, authorized to issue them, and by the issuing of new bonds, even after the bringing of this suit, to take up the certificates. *Held*, that it was a ratification; and that the defendant was estopped from denying their validity.

The last two issues of certificates did not contain the convertibility clause; but they had always been converted into bonds the same as the earlier numbers, and the president of the defendant—the officer who had charge of converting them—told the plaintiff, before he purchased, that they were convertible into bonds, and showed him the stockholders' vote to that effect. *Held*, that they should be treated the same as the other certificates.

The company cannot now deny the consideration in the certificates, having always treated them as though given in surrender of a dividend actually earned and warranted, and issued in settlement of dividends.

The Cheshire R. R. Co., one of the trustees named in the writ, is a foreign corporation. The process alleged that said company "has an authorized agent resident within the State of Vermont at Bellows Falls, in the town of Rockingham and the county of Windham and said State." Such allegation is sufficient to give the court jurisdiction, when legal service has been made.

The office of allegations by a trustee under section 1094, R. L., is not to present for trial the same issues raised and tried between the principal parties; and allegations for that purpose will be dismissed on motion.

Improper use of the term *ultra vires* referred to.

GENERAL assumpsit. Heard on the report of a referee, September Term, 1879, Rutland County, Dunton, J., presiding. Judgment pro forma for the defendant. The case was referred to Hon. Jonathan Ross, who reported substantially the following facts. The action was brought to recover the amount of certain certificates. The following are copies:

[No. 1.]

SCRIP DIVIDEND, RUTLAND R. R., FEBRUARY 1, 1872.

RUTLAND R. R. CO.

§..... RUTLAND, VT., February 1st, 1872.

This certificate entitles the holder to the sum of dollars, with interest thereon after date, in settlement of dividends on the preferred guaranteed stock of the Rutland R. R. Co., and is to be paid whenever the company, from its earnings, shall have extinguished its floating debt, and have a sufficient sum to pay the dividend of which this scrip is a part.

By a vote of the company this certificate may be exchanged on demand into seven per cent. income bonds of the Rutland R. R. Co. at par, with adjustment of interest.

No. Treasurer.

[Nos. 2, 4 and 5, dated respectively Aug. 1, 1872, Aug. 1, 1873, and Feb. 2, 1874.]

SCRIP DIVIDEND, RUTLAND R. R.

RUTLAND R. R. CO.

§..... RUTLAND, VT., August 1st, 1872.

This certificate entitles the holder to the sum of dollars, with interest thereon after date, in settlement of dividends on the preferred guaranteed stock of the Rutland R. R. Co., and is to be paid at the option of the company.

No. Treasurer.

By vote of the company this certificate may be exchanged on demand into any bonds that the company may issue.

[No. 3.]

SCRIP DIVIDEND, RUTLAND R. R., FEBRUARY 1st, 1873.

RUTLAND R. R. CO.

§..... RUTLAND, VT., February 1st, 1873.

This certificate entitles the holder to the sum of dollars, with interest thereon after date, in settlement of dividends on the preferred guaranteed stock of the Rutland R. R. Co., and is to be paid at the option of the company, and convertible at the option of the holder into the 8 per cent first mortgage bonds of the company.

No. Treasurer.

Nos. 6 and 7, dated respectively Aug. 1st, 1874, and Feb. 1st, 1875, were like Nos. 2, 4 and 5, except they did not provide for their exchange into bonds.

There were two mortgages on the Rutland & Burlington R. R. Co. The charter was to the second mortgage bondholders, or in their interest; and the issue of preferred stock was intended to

be used to liquidate the first mortgage debt of the company, and such claims as were resting on the property prior to the second mortgage debt. The 8th and part of the 9th section of the act of incorporation passed in 1876, are as follows:

“Sec. 8. Said corporation shall be authorized, upon vote of their directors, to issue a preferred or guaranteed stock, for the purpose of satisfying, paying or purchasing prior claims or incumbrances upon or interest in said road and property, and not exceeding in amount the amount justly due upon said prior claims or incumbrances. And such stock may be exchanged for such prior claims or incumbrances, upon such terms as may be agreed upon. And said preferred or guaranteed stock, when so issued, shall be entitled to receive dividends from the earnings and income of said corporation at the rate of seven per cent per annum, payable semi-annually, free of United States tax, before any other dividends shall be made therefrom. And said corporation shall pay and shall be liable to pay such dividends on said preferred stock semi-annually from their earnings or income. And until declared, interest shall be added to each dividend from the end of the half year when the same shall be declared. And no dividends shall be paid on the common stock of said corporation until a dividend is made on said preferred stock, nor while any semi-annual dividend on said stock or interest thereon herein provided for, remains undeclared. And no mortgage of said road and property, or any part thereof, shall be made by said corporation that shall take precedence of said preferred or guaranteed stock in the application of the income of said corporation.”

“Sec. 9. No preferred or guaranteed stock shall be issued by said corporation, unless an equal amount of claims or incumbrances on said road and property prior to that of said corporation shall be thereby satisfied, retired, or exchanged therefor.”

Amendments were made to the charter, and are found in the acts of 1868, page 217; of 1870, page 339; and of 1872, page 381. The defendant owed a floating debt, August 1, 1868, \$131,717.39; August 1, 1869, \$212,402.07; August 1, 1870, \$138,215.84; August 1, 1871, \$1,282,532.62; February 1, 1872, \$1,561,588.82; August 1, 1872, \$1,475,418.02; February 1, 1873, \$866,045.81; August 1, 1873, \$769,888.16; February 1, 1874, \$606,873; August 1, 1874, \$732,146.11; February 1, 1875, \$714,060.28; August 1, 1875, \$656,015.45; Feb. 1, 1876, \$823,794.14; August 1, 1876, \$413,711.20; February 1, 1877, \$361,375.99; August 1, 1877, \$314,710.85; February 1, 1878, \$358,532.93; August 1, 1878, \$395,250.07; February 1, 1879, \$374,426.33; August 1, 1879, (estimated) \$340,000.

The defendant railroad had been leased, February 8, 1871, to the managers and receivers of the Vermont Central and Vermont & Canada railroads, and its income was from rents when the certifi-

cates were issued. *It had issued \$4,300,000 of preferred guaranteed stock, and \$2,500,000 of common stock, prior to February, 1872. On April 28, 1870, it had also issued \$500,000 of its seven per cent bonds; and on September 15th of the same year, \$500,000 of eight per cent bonds; both secured by mortgage on its rolling stock and equipments. The seven per cent bonds were given as a bonus to the subscribers and owners of the preferred stock; the eight per cent bonds were issued to equip and furnish the railroad, and pay debts contracted for that purpose.

As to the capacity of the defendant to pay the floating debt, current expenses, and the certificates, the referee reported:

"From the foregoing facts I find that if the floating debt and current expenses were to be first paid out of rent or income received, the defendant has had no funds with which to pay the plaintiff's certificates, and had none at the time the demands were made. If the preferred stock was entitled to be paid dividends before the floating debt, the income of the company from rents at the time of the demands had been sufficient to pay all such certificates issued by the defendant. The rents received from August 1, 1871, to February 1, 1875—the period for which scrip certificates were issued in payment of dividends on the preferred stock—were more than enough to pay these dividends in cash if first applied thereto, and nearly or quite enough to pay in addition the interest on the equipment bonds and the first mortgage eight per cent bonds sold.

"This question as to which has the first right to the income, is submitted to the court on the facts reported, as also is the question whether the plaintiff at the time of said demands or either of them, on the facts reported was entitled to receive eight per cent first mortgage bonds for any, and if so for how many, of said certificates, and whether if entitled to receive such bonds, the refusal to furnish them or to comply with his demands, entitled him to recover the amount of such certificates and interest of the defendant."

As to the issuing of the certificates:

"At the annual meeting of the stockholders, holden January

*The vote by the stockholders authorizing the preferred stock was as follows:

"Resolved, That for the purpose of satisfying, paying, purchasing or exchanging the prior claims or incumbrances or interests in the Rutland & Burlington R. R. Co., that this company issue to the holders of such claims, certificates of preferred stock of this company, in shares of one hundred dollars each, equal in amount to the principal and interest on such claims, incumbrances or interests up to August 1, 1867, agreeably to the act of the Legislature incorporating this company, securing to the holders of such stock, dividends upon the par value thereof, of three and one-half per cent, free of United States tax, payable semi-annually, on the first days of February and August in each year, commencing on the first day of February, A.D. 1868."

30th and 31st, 1872, the company was found to have a floating debt of over a million and a half dollars. This was a surprise to many of the preferred stockholders. . . . At this meeting the following resolution was passed:

‘Resolved, That the directors be authorized and are hereby instructed to prepare and issue to the holders of the preferred stock, a scrip dividend of three and a half per cent, to date February 1, 1872, upon forty-three thousand shares of preferred stock; and also that said directors are hereby instructed to issue, as the necessities of the road in payment of accruing dividends and the debt of the corporation may require, a seven per cent bond, not exceeding twelve hundred thousand dollars in amount, such bonds to bear date February 1, 1872, payable twenty years from date; with interest payable semi-annually, on the first days of February and August of each year, secured upon the income of the corporation, to be disposed of in liquidation of the debt, at not less than the par value, provided, that the scrip dividend upon the preferred stock shall in sums of not less than one hundred dollars, be at all times convertible into such seven per cent bond, dollar for dollar of principal and interest until such time as the corporation shall resume dividends payable in cash upon the preferred stock.’

“Accordingly the directors caused to be issued to the preferred stockholders certificates, of which No. 1 is a copy.”

Also the following:

“Resolved, That Messrs. Edward Blake, A. W. Spencer, and Jacob Edwards, as a committee of the stockholders, be appointed to act as an advisory committee with the directors, in matters relating to the finances of the corporation, with power to make such examination of the accounts and business of the company as may in their judgment promote the best interests of the stockholders. Such committee to make report at a future meeting of the stockholders.”

The advisory committee called a meeting of the stockholders, March 13, 1872, to hear its report, and see whether the vote authorizing an issue of bonds not exceeding \$1,200,000 should be modified or rescinded. At the annual meeting the directors were also called upon to make and publish a report to the stockholders of the financial condition of the road to January 30, 1872.

“At the said meeting and at other times, the preferred stockholders to some extent if not generally were claiming that they were entitled to the income and earnings of the property to the extent of the dividends on their preferred stock provided for by the charter, whether the floating debt was paid or not. The advisory committee, at the March meeting, reported on this subject as follows:

‘It has generally been understood that the preferred stock in the Rutland R. R. Co. carried all the security of a first mortgage, and

that was undoubtedly the intention when the charter was obtained, as the object was to offer the strongest inducements possible to the holders of the first mortgage bonds of the Rutland & Burlington R. R., to surrender their bonds and take the preferred stock of the Rutland R. R. Co., and as between the preferred stock and the common stock, and in the absence of any unsecured debt, it is to all intents and purposes a first lien upon the property; but by the general law of Vermont any legal indebtedness of the company would take precedence of it, and while no mortgage can be put upon the property as the charter now exists, the laws of Vermont leave no room to doubt that the rights of the preferred stock are subordinate to those of the creditors. We desire to set the stockholders right on this point before submitting our proposition.' This committee presented a plan to said meeting, and the president presented another plan. Both were for the relief of the company from its floating debt. The stockholders, after discussion, Voted, First, to appropriate the income of the road to the payment of the outstanding indebtedness, until it is provided for in the manner herein stated.'"

'Second, to rescind that portion of the vote passed at the last annual meeting of the company authorizing the issue of a seven per cent bond, and the conversion of the scrip dividend, authorized by said vote, into seven per cent bonds.'

'Third, to pay future dividends on the preferred stock of the company by issuing to the holders thereof scrip (dividends) therefor as the same may become due, until the debts of the company are provided for, as herein stated.'

'Sixth, Voted, that in the event of the failure of the stockholders of this company to take the stock hereinbefore provided for, that the directors of the Rutland R. R. Co. are hereby instructed to petition the General Assembly of the State of Vermont at its session in October next, for such an amendment of their charter as will authorize the company to make and execute a mortgage on its franchise, railroad, depots, machine-shops, and property now under lease to the trustees and managers of the Vermont Central and Vermont & Canada railroads, not including the rolling stock already mortgaged for the payment of five hundred thousand seven per cent, and five hundred thousand eight per cent equipment bonds and exclusive of the steamboat property, as security for an issue of bonds, to be known as first mortgage bonds, and not to exceed in amount one million five hundred thousand dollars, redeemable within thirty years, and to bear interest at a rate not exceeding eight per cent per annum, payable semi-annually in the city of Boston.'"

"The plaintiff, soon after this meeting, May 11, 1872, became the owner of quite an amount of the preferred stock, and continued to be such stockholder until January 28, 1878, when he trans-

ferred two hundred and twenty-five such shares, being all he owned; but he never attended any of the stockholders' meetings while such owner; nor did he attend the annual meeting in 1872; nor the special meeting holden in March of that year when the foregoing votes were passed." . . .

"I find that during all the time since the organization of the defendant corporation, the plaintiff has resided in the village of Rutland where the meetings of the stockholders of the company were held, and took the Rutland Daily Herald in which the proceedings of said meetings and the substance of the annual reports to the stockholders were published."

"May 4, 1872, at a regular meeting of the directors of the defendant, it was

'Voted, that scrip be issued in payment of the dividend for August next upon the preferred stock of this company, said scrip to be payable at the option of the company with interest at six per cent, and convertible into any bonds that the company may issue.' "

Accordingly the treasurer issued to the preferred stockholders certificates, of which No. 2 is a copy.

The directors obtained an amendment to the charter at the session of the Legislature, 1872 (Session Laws, page 382), as follows:

"**SEC. 1.** The Rutland R. R. Co., if it shall vote so to do, at a meeting of the stockholders called for that purpose, shall have power to issue their notes or bonds for the purpose of raising means to pay the indebtedness of said company, which notes or bonds shall bear interest at a rate not exceeding eight per cent, and may be secured by mortgage, and in such manner as said company shall deem expedient."

"A stockholders' meeting was duly holden October 21, 1872, at which a mortgage of the property, specified in the vote of March, 1872, was authorized, and the same was duly executed to secure the payment of \$1,500,000 of the defendant's bonds, having thirty years to run and bearing interest at the rate of eight per cent, payable semi-annually. The bonds are called the first mortgage eight per cent bonds, and were duly issued to the amount named.

The vote authorizing their issue provided that these bonds should "be sold only to retire an equal amount of claims against, or indebtedness of, the company now outstanding or in exchange therefor."

"The directors on the same day,"

"Voted, That the officers of this company be directed to notify the stockholders thereof and the holders of scrip and other forms of indebtedness of the company, that an eight per cent mortgage bond, having thirty years to run, has been authorized by the

stockholders in special meeting this day, to be issued, and that said bonds are ready for sale to the stockholders, or exchange with said holders of scrip, &c."

Such notice was duly published to the stockholders. The directors at a meeting July 25, 1874,

"Voted, That the dividend on the preferred stock of this company, due August 1st, next, be paid in the scrip of this company in the same way and manner as dividends have been heretofore paid."

Accordingly certificates were issued of which No. 4 is a copy.

At a directors' meeting January 27, 1874, it was voted, "That the matter of further issue of scrip be referred to the stockholders." At a stockholders' meeting holden the same day it was voted;

"That the scrip dividend to be hereafter declared be made convertible hereafter as heretofore into the eight per cent bonds of the company at par, and that scrip shall be entitled to an interest of six per cent thereon until converted or paid."

At a directors' meeting holden subsequently on the same day, it was voted "To pay the next dividend on the preferred stock in scrip on and after the 9th proximo." The treasurer issued to the preferred stockholders scrip certificate No. 5, in form and language in all respects like Nos. 2 and 4, except it was dated February 2, 1874.

At a meeting of the directors holden, July 28, 1874, the following action was taken:

"Whereas, It was voted at a meeting of the stockholders of this company, on the 27th of January, 1874, that the scrip dividend hereafter to be declared, be made convertible into the eight per cent bonds of the company; and whereas, the company is now compelled to secure a portion of its floating debt by a pledge of all its eight per cent bonds now unconverted, it is voted by this board that until the floating debt of this company shall be so far paid that such bonds can be redeemed from any pledge for its floating debt the scrip hereafter to be issued shall not bear upon its face any contract for such convertibility." This action of the directors was known to many of the stockholders, but was not known to the plaintiff until after this suit was commenced.

Accordingly when the next certificates, No. 6—were issued, they did not contain the convertibility clause. January 27, 1875, the directors in meeting,

"Voted, In accordance with instructions given the directors by the stockholders at their last annual meeting—that the treasurer be directed to issue the scrip of the company in payment of the dividend due on the 1st day of February next on the preferred stock."

The treasurer issued, accordingly, certificates—No. 7—in form and language like No. 6, except the date.

The directors, July 26, 1877, in meeting,

“Voted, Whereas certain promises have been given in relation to the conversion of scrip into bonds of the company amounting to about ten thousand dollars (\$10,000), the president and treasurer are authorized to make such conversion, and thereafter no more of the scrip shall be converted, until the floating debt of the company is fully extinguished.”

Also in another directors' meeting, December 6, 1877, it was voted to offer such certificate-holders a six per cent twenty years' income bond in exchange for such certificates; and also to authorize the issue of such bonds, “provided that in the opinion of the counsel of the company there are no legal objections. Also that in so far as the president deems the company to have been pledged for the resumption of any portion of the scrip in bonds now on hand, he is authorized to take up and cancel such scrip in fulfillment of any such implied obligation.” At a meeting of the directors holden July 31, 1878, so much of the last named vote as “authorized the issue of twenty-year bonds in exchange for dividend scrip” was rescinded and no action ever taken under it.

The referee found:

“All the votes of the stockholders and directors were duly spread upon the records of the company; but it did not appear that the plaintiff ever knew of but one of them, that of the stockholders in January, 1874. The plaintiff received scrip certificates as they were issued from time to time on the preferred stock owned by him and they have all been converted into the eight per cent first mortgage bonds. A large proportion of the scrip certificates so issued have been so converted, amounting to over \$1,000,000. In such conversions no distinction or difference has been observed between Nos. 6 and 7 and the earlier Nos. Nos. 6 and 7 have been converted into the bonds as readily as the earlier Nos. Considerable of this scrip was sold in the market, and was purchased by the president, treasurer, and some of the directors.

“The president received about \$19,000 of such scrip certificates on preferred stock which he owned, and purchased quite a large amount of the same in the market, and had most of it converted into eight per cent first mortgage bonds, and the balance of a few thousand dollars have recently been converted into the new five per cent bonds.

“The scrip so purchased in market was converted by the company into the eight per cent first mortgage bonds for the purchaser as readily as it was to the holders of the preferred stock to whom the scrip certificates thereon were issued. The plaintiff purchased quite a large amount of said scrip certificates in the market, and the company through its president and treasurer converted \$10,000 of it into eight per cent 1st mortgage bonds in the summer of 1877.” . . .

"January 5, 1877, the plaintiff's attorney for and in behalf of the plaintiff took all the scrip certificates to the defendant's office in Rutland and there demanded of John B. Page, the president, and J. M. Haven, the treasurer of the defendant, the before mentioned eight per cent first mortgage bonds in exchange for said scrip and accrued interest. Both said Page and Haven declined so to convert them at that time, saying that the defendant had none of the first mortgage eight per cent bonds on hand except such as were pledged as collateral security for the payment of some part of the defendant's floating debt, or such as it was necessary to use immediately for that purpose in renewal of such debt, but not always to the same party, but that they would so convert them in a short time and as soon as some of such bonds should be relieved from such pledge. He then demanded the money on said certificates and accrued interest. This they both peremptorily refused to pay." . . .

"On July 15, 1877, the plaintiff by his attorney repeated his former demand, except calling for the seven per cent income bond in exchange for the certificates dated February 1, 1872, to said Page and Haven.

"Said Page said he would convert the first four numbers in a few days, but could not at that time, for the reason before stated when demand was made. Said Haven said he would convert the first three numbers in a short time. Both declined to convert all the numbers later than those specified. The said attorney then demanded payment of all said certificates in money, which was absolutely refused." . . .

"As appears from some of the votes of the defendant's directors before recited, and from other testimony, I find that said Page had the general direction of the conversion of scrip certificates into bonds." . . .

"Said Page uniformly promised to make such conversion as soon as the bonds, eight per cent first mortgage, could be redeemed from pledge for the company's floating debt, and said it would be in a short time. The exact dates of these interviews were not given, but I conclude they were subsequent to the passage of the vote of the directors heretofore recited, dated July 28, 1874, and I so find. Prior to that period all such certificates presented for conversion were converted into the eight per cent first mortgage bonds. It did not appear that the company had ever converted any of such certificates into any other of the company's bonds except recently into five per cent bonds." . . .

"At intervals between the calls of the plaintiff, the company has had on hand, and used such bonds in taking up such certificates for other parties, and among others the president, said Page, and some of the directors, had quite an amount of such certificates converted into such bonds. During such intervals, and

about the summer of 1877, but exactly when did not appear, the plaintiff had \$10,000 of such scrip certificates, mostly of the last number or those which did not have the convertibility clause upon their face, converted into such bonds." . . .

"I find said Page told the plaintiff that the last two numbers, which contain no clause in regard to their convertibility, were convertible the same as those which contained such clause, and showed him the stockholders' vote of 1874. I find the company and its directors have so treated them, under the vote of the stockholders in January, 1874." . . .

"The annual reports to the stockholders for the years 1871, 1872, 1873, 1874, 1875, 1876, 1877 and 1878, as published and circulated, either in pamphlet or in the Rutland Herald, were put in evidence and the statements therein contained in regard to the financial condition of the defendant were conceded to be correct. These reports generally came to the knowledge of the plaintiff, and may be referred to as a part of this report." . . .

"At the annual meeting of the stockholders holden July 31st, 1878, a mortgage of its entire property was authorized to the New England Trust Co. to secure the payment of \$1,500,000 twenty year bonds or notes of the defendant, bearing five per cent interest, \$1,000,000 of which was to be used to take up the equipment bonds maturing in 1880, and the balance to fund any of the other indebtedness of the company, including the outstanding scrip dividends or certificates. Such mortgage and bonds were issued, dated August 1, 1878. The mortgage was put in evidence, and may be referred to as a part of this report. It recites the vote which authorized it. Nearly \$900,000 of the seven and eight per cent equipment bonds have been exchanged for these new five per cent bonds, as well as quite an amount of the outstanding scrip certificates, so that only about \$70,000 of such certificates are now outstanding. The company are ready to convert the plaintiff's certificates at their par value and accrued interest into these new five per cent bonds." . . .

"The defendant claimed that it had never had income or earnings out of which a dividend could properly have been made at the time when any of said scrip certificates were issued, and for that reason said certificates were issued without authority and without consideration, and are not binding on the defendant. Whether it had income or earnings applicable to such purpose depends on the facts aforesaid. I find that the defendant has uniformly treated the scrip certificates as an obligation binding on the defendant; and the referee is of the opinion that they are binding obligations of the defendant, but, whether due at the time this suit was commenced, or collectible in this form of action, is submitted to the court."

The other facts are stated in the opinion of the court.

James C. Barrett and J. Barrett for the plaintiff.

The common courts are appropriate. *Reed v. Sturtevant*, 40 Vt. 521; *Crandall v. Bradley*, 7 Wend. 312; *Hennings v. Rothschild*, 4 Bing. 315 (13 E. C. L. 448); 2 Johns. 235; *Perry v. Smith*, 22 Vt. 301. Action sustainable in name of the "holder." *Hodges v. Shaler*, 22 N. Y. 114; *Hotchkiss v. Banks*, 21 Wall. 354; 1 Dan. Nego. Inst. s. 59; *Capron v. Capron*, 44 Vt. 410; *Hennings v. Rothschild*, supra. Consideration in the certificates sufficient. *Stevens v. The South Devon R. R. Co.*, 9 Hare, 313; *Browne v. Monmouthshire R. R. & Canal Co.*, 13 Beav. 32; *Moore v. Hudson R. R. Co.*, 12 Barb. 156, 160; 2 Redf. Railways, s. 211; *Cross v. Richardson*, 30 Vt. 641; *Wilson v. Wilson*, 32 Barb. 328. Import of the certificates. They fall within the general power of the corporation to borrow money and execute instruments in evidence thereof. *Angell & Ames Corp.* s. 257; *Field Corp.* s. 271; *Jones' R. R. Secu.* s. 306; 1 Dan. Nego. Inst. ss. 381-6. The certificates have been ratified. Defendant estopped from denying their validity. *Field Corp.* s. 208, n.; *Bissell v. The Michigan, etc., R. R. Co.*, 22 N. Y. 258; *Kent v. Quicksilver M. Co.*, 78 N. Y. 184-9.

A corporation after having declared a dividend and paid it to the other stockholders, cannot defend against a suit to recover the same by one stockholder, on the ground that the dividend has not been earned. *Stoddard v. Shetucket Co.*, 34 Conn. 542; 2 Redf. Railways, s. 240, n. The plaintiff not chargeable with knowledge. *Angell & Ames Corp.*, p. 400; *Field Corp.*, s. 73. The nature and rights of the "preferred or guaranteed stock" are defined by the defendant's charter. The charter is the law. As to "preferred stock" and "dividend" meaning indebtedness, payment, security, see *Burt v. Rattle*, 31 Ohio St. 116; *R. R. Co. v. Jackson*, 77 Pa. St. 321-5; 8 Mich. 100; 11 Rep. 691; 13 ib. 475; *Bates v. Androscoggin R. R.*, 49 Me. 491; *R. & B. R. Co. v. Thrall*, 35 Vt. 545; *R. R. Co. v. Maine*, 6 Otto. 511; *Tomlinson v. Jessup*, 15 Wall. 459; *Cooley Con. Lim.* (4th ed.) p. 340, n.; *Hyatt v. McMahon*, 25 Barb. 457; 13 Gray, 239; 23 Pick. 340.

Prout & Walker for the defendant.

No recovery on the common counts. 2 Greenl. Ev. s. 111; Alb. Tr. Ev. 277, 457; *Royce v. Nye*, 52 Vt. 372; *Vaughn v. Rugg*, ib. 235. Refusing to exchange the certificates did not convert the plaintiff's claim into a money obligation. *Scott v. Montague*, 16 Vt. 164; *Rice v. Adams*, 32 Vt. 691; *Hale v. Fish*, 48 Vt. 227. Certificates not negotiable; hence, the "holder" cannot recover under the common counts. *Wainwright v. Straw*, 15 Vt. 215; *Smilie v. Stevens*, 41 Vt. 321; *Story Pro. N.* ss. 17, 18; *Farquhar v. Ins. Co.*, 6 Rep. 676; *Bank v. Green*, 13 Rep. 625; *Merriwether v. Saline Co.*, 5 Dillon, 265; *Byles' Bills*, 160, 164; *R. R. Co. v. Howard*, 7 Wall. 396; *Way v. Smith*, 111 Mass. 523, 137; 11

Gray, 170. Defendant had no right to exchange its mortgage bonds for the certificates. *Wade Retroactive Laws*, s. 71. Plaintiff affected with notice. *Green v. Bank*, 1 *Thompson's Bank Cas.* 497; *Chaffee v. R. R. Co.*, 53 *Vt.* 352; *People v. Batchellor*, 22 *N. Y.* 128. The funds must be applied as provided for by charter. *Munt v. Shrewsbury R. R. Co.*, 3 *Eng. L. & Eq. R.* 149; *McGregor v. The Deal & Dover R. R. Co.*, 16 *L. & Eq.* 180; 21 *How.* 441; *Horton v. Thompson*, 71 *N. Y.* 513; 14 *L. R. Eq.* 322; 2 *Abf. Dig. L. Corp.* 77, s. 55. Preferred or guaranteed stock not entitled to dividends until all debts of defendant are paid. *Field Corp.* s. 121; *Lockhart v. Van Alstyne*, 31 *Mich.* 76; *Williston v. Michigan R. R.*, 13 *Allen*, 400; *Taft v. Hartford R. R. Co.*, 8 *R. I.* 310; 1 *Dillon*, 174; *St. John v. Erie R. R. Co.*, 10 *Blach.* 271; 4 *Am. Corp. Cas.* 92; *McGregor v. Home Ins. Co.*, 6 *Stewart (N. J.)*, 181; *Henry v. The Great N. R. R. Co.*, 58 *Eng. Ch. R.* 605; *Boardman v. L. S. & S. Mich. R. R. Co.*, 84 *N. Y.* 157; *Green's Brice*, 147, n.; 1 *Potter L. Corp.* 329; 2 *Redf. Railways*, 529, 240, 544; *Jones' R. R. Securities*, s. 623; *Boone Corp.* 125; *Field Corp.* ss. 104, 172; 33 *Conn.* 457; 72 *N. Y.* 207. It is a breach of trust and fraud to declare a dividend where no profits have been made. 1 *Redf. Railways*, 153; *Burnes v. Pennell*, 2 *H. L. Cas.* 496; *Bigelow Frauds*, 151; *Mann v. Cook*, 20 *Conn.* 217; 2 *Redf. Railways*, 537; 3 *Keyes*, 521. The stock and property a trust fund to pay the debts. *Nat. Trust Co. v. Miller*, 6 *Stewart (N. Y.)*, 163; *R. R. Co. v. Howard*, 7 *Wall.* 409; *Bartlett v. Drew*, 57 *N. Y.* 587; 3 *Mason*, 311; *Field Corp.* s. 143; *Upton v. Tribilcock*, 91 *U. S.* 47; 2 *Black.* 721; 1 *McCrary*, 86; *Richardson v. R. R. Co.*, 44 *Vt.* 622; 22 *Wall.* 136; 10 *Blatch.* 271-9; *Evans v. Coventry*, 8 *De G. M. & G.* 835. Ratification. Doing a thing prohibited not a ratification of it. *Story Agency*, 115; 9 *Exchequer*, 55; 43 *N. H.* 516; 7 *Conn.* 93; 22 *Conn.* 501; *Pearce v. M. & I. R. R. Co.*, 21 *How.* 442; 5 *Denio*, 567; 41 *N. Y.* 35; 3 *Cow.* 623; *Pierce Railroads*, 34; *Angell & Ames Corp.* 309; 1 *Seld.* 320. No estoppel. 2 *Redf. Railways*, s. 236; *Chase v. Vanderbilt*, 62 *N. Y.* 307; *Bigelow Estop.* 438, 515, 263; 19 *Wall.* 146, 160; 38 *Barb.* 534; 34 *N. Y.* 30; *Herman Estop.* 510; *Boone Corp.* 104; 9 *R. I.* 366; 11 *Wend.* 18; 8 *Cow.* 543; *Field Corp.* s. 264.

VEAZEY, J.—The Rutland & Burlington R. R. Co. had two mortgages resting upon its property, and the road was in possession of, and being operated by, the trustees of the second mortgage bondholders. The trustees of the first mortgage bondholders had brought suit to foreclose that mortgage. While this suit was pending the bondholders under the second mortgage obtained an act of incorporation under the name of the Rutland R. R. Co., for the purpose of "holding, maintaining and operating" said R. & B. R.

R., and in July of that year, 1867, the company was organized. Under the authority of the eighth and ninth sections of the charter and for the purpose therein named; and under the circumstances detailed in the referee's report, the defendant by corporate vote, issued prior to February, 1872, "preferred or guaranteed stock, commonly called preferred guaranteed stock," to the amount of \$4,300,000. The company had also issued common stock to the amount of \$2,500,000. February 1, 1872, the company made its first issue of certificates of "scrip dividend," specified therein as being "in settlement of dividends on the preferred guaranteed stock." Thereafter from time to time the company continued to issue similar certificates, but varying somewhat in their terms. The plaintiff having become the owner and holder of such certificates of different issues to an amount of over \$21,000, and having demanded an exchange into the bonds of the company referred to in the certificates, and the company having refused to make the exchange, and then having demanded payment and been refused, brought this suit declaring in the common counts in assumpsit, to recover the amount of his certificates.

The plaintiff was a preferred stockholder from June 4, 1872, to October 9, 1877, and during this time purchased the certificates in suit and others, and had issued to him certificates on his own stock. The referee gives a statement of the floating debt of the defendant at yearly and half yearly intervals, beginning August 1, 1868, and ending August 1, 1879, and says these were the balances of the bills payable as shown by the treasurer's books at the several dates named, which both parties treated as a fair representation of the floating debt of the defendant.

The referee finds that if the floating debt and current expenses were to be first paid out of rent or income, the defendant has had no funds with which to pay the plaintiff's certificates, and had none at the time the demands were made and this suit brought. If the preferred stock was entitled to be paid dividends before the floating debt was paid, the income of the company at the time of the demands had been sufficient to pay all such certificates issued by the defendant. The road was leased before the certificates were issued and its sole income was from rents.

The defendant claimed before the referee and now insists that it never had income or earnings out of which a dividend could properly be made at the time when any of the scrip certificates were issued, and that the certificates were issued without authority and without consideration and are not binding on the defendant.

I. A primary question on the facts reported is: Which has the first right to the income, the creditors of the defendant company, or the preferred stockholders? The provision of the charter, section 8, is, that the preferred or guaranteed stock shall be entitled

to dividends from the earnings or income of the corporation before any other dividend shall be paid.

The construction of similar provisions has not unfrequently been involved in causes in this country and in England, and the struggle has been to gain for the preferred guaranteed stockholders the double advantage of a shareholder and creditor, but without success. The legislation in this State and elsewhere has been in accord with the idea developed in the reported cases, that the stock and property of a corporation is a trust fund pledged for the payment of its debts, and the creditors' right to payment and their lien is prior to the right of every stockholder. In the late case of *National Bank v. Douglass*, McCrary's Rep. vol. 1, p. 86, the court say "sacredly pledged," and quoting the language of Judge Clifford in *Railroad Co. v. Howard*, 7 Wall. 392, adds that "stockholders are not entitled to any share of the capital stock nor any dividend of the profits until all the debts of the corporation are paid." To similar purport and equally strong is the language of Judge Story in *Wood v. Dummer*, 3 Mason, 308; and again in *Mumma v. Potomac Co.*, 8 Pet. 286, and of Judge Curtis in *Curran v. The State of Arkansas and Others*, 15 How. 304. See also the numerous cases in defendant's brief on this point.

It is now well established that dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; *Pierce on Railroads*, p. 125, and cases cited in notes; and that such dividends are not payable absolutely and unconditionally as interest is, but only out of profits made by the company. The preference is limited to profits whenever earned. *Jones on Railroad Securities*, s. 620, and cases cited in notes; *Field on Corporation*, s. 121, and cases cited; *Corry v. Railroad Co.*, 29 Bevan, 263; *McGregor v. Ins. Co.*, 6 Stewart's Eq. Rep. (N. J.) 181; *St. John v. Erie R. R. Co.*, 10 Blatch. 271; s. c., 22 Wall. 136; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Railroad Co.*, 8 R. I. 310.

Under the provision of this charter it is not a debt that is guaranteed, but the right to a dividend from the earnings and income of the corporation. The right to a dividend is not a debt. There is no debt until the dividend is declared. The obligation and right to declare it does not arise until there is a fund from which it can properly be made. See cases *supra*; also *In re London India Rubber Co.*, Law Rep. 5. Eq. Cases, 525.

In this case it could only be made from "earnings and income." The only earnings and income was the rental which was insufficient to pay the operating expenses and the floating debt. Upon the plaintiff's theory there was an unqualified obligation to declare and pay dividends to preferred stockholders from the earnings and income, notwithstanding there were debts of the company greater than the earnings and income. The creditor must come after the stock-

holder. Under this claim the rule universally recognized in the books that the property of a corporation is a trust fund pledged for the payment of the debts of the corporation, and the distinction everywhere upheld between a stockholder and creditors, would have to be disregarded. In our view the terms of the charter neither force nor import such construction.

But the learned counsel for the plaintiff deny that the preferred stock was capital stock, and insist that the only capital stock of the defendant company is the common stock, or the stock that was issued to the second mortgage bondholders, and that the intent and meaning of the charter in reference to the issue of preferred stock, was to provide means of exchanging the first mortgage bonds into a preferred stock, but not to affect the security, and that such was the understanding of all parties at the time, and that wherever preferred stockholders have been held to be stockholders in distinction from creditors, it has been upon the ground that by the terms of the act or contract their stock formed a part of the capital stock, and that they by taking the same become in reality and in substance, as well as in name, stockholders, holders of shares of capital stock.

It is true the charter was granted to the second bondholders, and provides that the capital stock, meaning undoubtedly the stock to be obtained by the second mortgage bonds, should be 3,000,000 dollars, and in the provision, section 8, for issuing the preferred or guaranteed stock, it is not called capital stock. But the counsel nowhere intimate in their able brief wherein the preferred stock lacked any element or quality of the common stock. It seems to have had every privilege and recognition of the common stock in the meetings and administration of the company. The referee puts it in this way: "Besides the preferred stock the company had issued about \$2,500,000 of common stock, the holders of which were entitled to and did vote in the stockholders' meetings, having equal power in shaping and controlling the action of the company, with the holders of preferred stock to the same amount." The preferred stockholders had not only every privilege but were exempt from none of the liabilities of the common stockholders. If the eighth section of the charter had said preferred capital stock instead of preferred stock, what different quality would that have given the stock? The charter specifies the amount of the capital stock of the company, which was sufficient to cover the second mortgage bonds, but much less than the value of the road, the charter being granted to those bondholders, and it then provides for the issue of preferred stock, and limits that to the amount of prior claims or incumbrances.

The terms of this charter are plain to the intent of providing for two kinds of stock, viz.: common stock and preferred or guaranteed stock. It makes no distinction between them except to the

effect that the preferred stock should receive dividends from the earnings and income of the corporation, at a rate and time named, with interest thereafter if not paid, "before any other dividend shall be made therefrom." What is there in the charter to indicate that the legislature intended to simply create a creditor class in creating preferred stockholders, and meant interest by the word dividend? As stated by Jones on Railroad Secur. s. 619, "whatever rights attached to it [preferred stock] when issued continue to adhere to it." The peculiar right specified in the charter to be attached to it, is the right to a dividend before any should be made upon the common stock, and that it may be converted into common stock. In *St. John v. Erie R. R. Co.*, supra, Judge Blatchford based his result upon a "fair and reasonable construction of the contract." Judge Swayne, in the same case in the Supreme Court, says: "The question presented in the present case depends for its solution wholly upon the construction given to the fifth clause of the agreement." The defendant's charter is the instrument to be construed here, and to borrow the words of Judge Swayne, "The language employed is apt to express the relation of stockholders. None to express the relation of creditors is found in the instrument." Under it "the preferred stockholders are entitled to have the full amount of their dividends paid before any payment is made in respect of dividends upon the ordinary stock." Jones, s. 620, and cases cited. In *Taft v. H. P. & F. R. R. Co.*, 8 R. I. 310, it was held that the word "guaranteed" in connection with preferred stock, did not change the legal effect of the rights of holders of such stock. Bradley, C. J., after referring to the English cases, says: "Without dwelling longer upon these and similar authorities, it is perfectly apparent that the guaranty of dividends by a railway company is considered by the courts and by the business community also, to mean nothing more than a pledge of the funds legally applicable to the purposes of a dividend; that, in short, it is a dividend and not a debt."

No claim is made in this case that the preferred shareholder does not have all the rights as a shareholder that is enjoyed by the holder of the common stock. The claim is that he is also a creditor with all the rights pertaining to that relation. Against this claim are the terms of the charter, the presumptions of law and the usual course of business. The evidence of his relation to the company is a certificate of stock which under the charter should, and probably does, guarantee a dividend to be paid to him before any dividend shall be paid on the common stock. Mr. Pierce, page 120, defines dividends to be corporate funds derived from the earnings of the corporation, and appropriated by a corporate act to be divided among the stockholders. A preferred dividend is the fund paid to one class of shareholders in priority to that to be paid to another class. See authorities cited by Pierce.

The case most relied upon by the plaintiff's counsel, where it was held that a holder of stock was a creditor, is that of *Burt v. Rattle*, reported in *The Reporter*, March 6, 1878, p. 310 (31 Ohio St. 116). The preferred stock in that case was issued under a statute that provided that the "holders of such preferred stock shall not have the right to vote on any question, at any meeting of the stockholders of such corporation, or for the election of officers, and shall not be liable for the debts of such corporation." And the corporation pursuant to a vote of the corporation secured the preferred stock then in suit by a bond and mortgage of the corporate property. Welch, C. J., in delivering the opinion of the court says: "A majority of us think that the transaction between the corporation and the so-called preferred stockholders, was in fact and in law a loaning of money upon mortgage security and not the creation of additional members of the corporation. A man who advances his money to a corporation, and takes a bond and mortgage for its repayment, and also by express agreement between the parties takes no interest or risks in the concerns of the company, is a creditor of the company, and to call him a stockholder is a simple misnomer."

The distinction between that case and the one at bar is apparent. It is insisted that the provisions of the defendant's charter to the effect that the preferred stock should be issued only for the "purpose of satisfying, paying or purchasing prior claims, or incumbrances upon or interests in said road and property," and should be limited to the amount of such claims, and providing the rate of dividend, and for its payment semi-annually, and, "until declared," interest thereon to be added from the end of the half year when the same should be declared, and that no mortgage should take precedence of the preferred stock in the application of income, all show a purpose to create a preferred stock with all the security of a first mortgage, taken in connection with the fact that the prior claims consisted largely of the first mortgage then in process of foreclosure.

Courts have not favored the creation of different classes of shareholders with superior rights in one over others. Doubt is expressed in the books whether there is power in a corporation to distinguish between its stockholders by making them unequal in interest and right, except as it is expressly granted. Although some courts and law writers have said that the issue of preferred stock is but a method of borrowing money, and that preferred stock is only a form of mortgage, we think the law as now settled is better expressed by *Pierce*, who says, page 124: "The issue of preferred stock is a mode by which a corporation obtains funds for its enterprise, without borrowing money or contracting a debt." The other view has been expressed generally in cases where the claim was that no dividend could properly be paid on preferred

stock before and without paying on the other stock, as in *R. & B. R. R. Co. v. Thrall*, 35 Vt. 536; or where the preferred stockholders had no right in the management of the company, and were not liable for debts, and were nominal stockholders only, as in *Burt v. Rattle*, *supra*.

It was necessary for the defendant, consisting of the second mortgage bondholders, to raise money to pay up the first mortgage, in order to save the property from going on that mortgage. Two ways were open to them, one to borrow money, the other to sell stock. They decided to try the latter method. The pressure was severe upon them, and the amount to be raised was large. The stock in order to be sold must necessarily be carefully guarded. The issue of the preferred stock in this case was made as it usually is, that is, when the corporation has reached a crisis in its affairs, and the corporators are unwilling or unable to put more or sufficient money into the business, but are nevertheless disposed to give to those who will do so a preference in profits. Careful guards are, therefore, usually thrown around preferred stock in the charter or contract, as was done in this case; but this did not change the character of the transaction. It was still an obtaining of funds by sale of stock, and not a borrowing of money on a mortgage.

These provisions of the charter seem to us to point to a careful security of the benefit of the preference as between the two kinds of stock, but not a preference over the creditors of the corporation; not a preference with a perpetual promise to pay more than a legal rate of interest on the sum invested, out of the earnings, without regard to what the corporation owes as a "floating debt," not a preference that would give to the holders of the preferred stock the character of corporators with the right to be the corporate managers, and also make them the preferred creditors of the corporation; not a preference under which the debts of the corporation might, and, as the company was situated, must go on increasing from year to year indefinitely unprovided for, while the stockholders and managers were receiving the whole income in dividends. We think the language of the charter well expresses what the report shows was the only object which the parties in interest needed or wanted to secure, so far as they then understood the situation, viz.: a preference in dividend between the two kinds of stock and nothing more. Under their preference the common stock can receive nothing until all the dividends on the preferred stock are paid according to the terms of the charter. *Pierce on Railroads*, page 125, and cases cited in notes.

It follows from this construction of the charter that the earnings of the defendant corporation should have been appropriated to the payment of its floating debt, in preference to the payment of dividends on preferred stock.

It appears from the report that until early in the year 1872, the financial condition of the company had not been fully understood, and that a very large floating indebtedness then first came to light. In this emergency the company began the issue of scrip dividend certificates. The first certificates were dated February 1, 1872, and they were issued every six months thereafter until February 1, 1875.

The plaintiff claims that even if the company had no profits out of which to pay dividends, and therefore ought not to have made or paid them, yet it is estopped from denying the validity of these certificates as obligations of the company by reason of its conduct in regard to them.

The defendant claims that they are incapable of ratification; that they are absolutely void because issued without right; that being issued when the company had no money applicable to dividends it was an unauthorized, illegal act, which affected the certificates the same as though prohibited in the charter.

There was no lack of authority to make dividends to preferred stockholders. The charter provided for it. The company's action in regard to dividends was unseasonable, that is before it had funds applicable. Did such unseasonable exercise of power render the certificates void? The question is not what might have been the right of creditors or stockholders had they interposed. But must the court say in behalf of the company only, that its premature exercise of charter power was void because premature? We think not. In *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542, it was held in an action against the corporation by a stockholder, to recover a dividend declared by the directors, if all the other stockholders have received and retain their dividends, the corporation cannot set up in defence, that the dividend has not been earned, and that its payment would withdraw a part of the capital. *Kent v. Quicksilver Mining Co.*, 78 N. Y. 186. "If the power to make the contract exists, and excess in some particulars is not a defence." *Pierce*, 518, and cases there cited. In *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 378, *Blackburn, J.*, says: "I think it very unfortunate that the same phrase of *Ultra Vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum*; for the two things are substantially different; and I think the use of the same phrase for both has produced confusion."

It is ordinarily a matter of internal management, to be determined by the company or the directors, when to declare dividends and the amount. This is subject to limitations, and equity will interfere either to enforce or restrain a dividend upon sufficient showing. *Green's Brice, Ultra Vires*, 2 Am. Ed. p. 202, and cases cited.

But equity even would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles. *Stevens v. The South Devon Ry. Co.*, 9 Hare. 313; reported also in XII. L. and Eq. 229; *Browne v. The Monmouthshire Ry. & Canal Co.*, 13 Beav. 32; reported also in IV Eng. L. and Eq. 113; *Moore v. Hudson R. R. Co.*, 12 Barb. 156, 160; 2 Redf. on Railways, s. 211.

These certificates being susceptible of ratification, should the defendant be estopped from denying their validity in this case? All these issues of certificates were authorized by nearly if not entirely unanimous votes of the corporation, followed by votes of the directors. The first vote was as follows:

“Resolved, That the directors be authorized and are hereby instructed to prepare and issue to the holders of the preferred stock, a scrip dividend of three and a half per cent, to date February 1st, 1872, upon forty three thousand shares of preferred stock.” The next vote was, “to pay further dividends on the preferred stock of the company by issuing to the holders thereof scrip (dividends) therefor as the same may become due.” Other votes followed from time to time. Every vote of the company and directors expressed or implied the idea of a payment of dividends. These certificates were all expressed to be “in settlement of dividends on the preferred guaranteed stock;” and were made convertible on demand or at the option of the holders, into mortgage bonds of the company, except the last two issues. The referee finds that the plaintiff received scrip certificates as they were issued from time to time on the preferred stock owned by him, and they have all been converted into bonds. Certificates have been so converted amounting to over \$1,000,000. In such conversions, no distinction or difference has been made between the two last issues, Nos. 6 and 7, and the earlier issues. Considerable of this scrip was sold in market and was purchased by the president, treasurer and some of the directors, and was converted into bonds. The scrip so purchased in market was converted by the company into bonds, for the purchaser as readily as it was for the holders of the preferred stock to whom the scrip certificates thereon were issued. This was done for the plaintiff to quite an extent down to about the time this suit was brought, July, 1878. The referee reports that the president had the general direction of the conversion of scrip certificates into bonds.

The president told the plaintiff that the last two issues, which contain no clause in regard to their convertibility, were convertible the same as those which contained such clause, and showed him the stockholders' vote to that effect. The referee finds the company and its directors so treated them, under that vote.

Some of the preferred stockholders when they saw such clause

was omitted from the scrip certificates, supposed they were not convertible into bonds and so sold them in market, and the plaintiff bought them at large discount, after he had been informed by the president that they were convertible into bonds, and was shown by him the said stockholders' vote to that effect; and he never knew until after this suit was brought, why the last two issues did not contain the convertible clause. Until after this suit was brought, neither the company nor any of its officers ever denied that these certificates were convertible into bonds, and the president and treasurer continued to make the conversions until after this suit was brought, though some of the later conversions were into a lower rate of interest bond, as shown in the report.

The referee does not find in terms that the plaintiff's certificates are the only ones not so converted; but he finds certificates have been so converted to an amount of over \$1,000,000; and it appears by computation that the total amount of certificates was about \$1,053,500. Therefore the fair conclusion from the report is that the plaintiff's certificates are substantially the only ones not converted.

It further appears that the floating debt of the company at the time this suit was brought had been very largely reduced, and it does not appear that the same treatment of these certificates with the other would have embarrassed the company, or that any creditor objected to the conversion.

The above is but a summary of what the report more fully shows that the company did in respect to the dividend certificates, and after stating the facts, the referee finds "that the defendant has uniformly treated the scrip certificates as an obligation binding on the defendant."

On the other hand, the plaintiff was a stockholder, and so far as affected by constructive notice is entitled to stand no better as to the certificates purchased by him than he would be as to certificates issued to him on his own stock. As a stockholder he cannot escape the responsibility pertaining to that relation for the wrongful policy of the company as to dividends. But it was only the financial condition of the company that rendered the policy wrongful. Can it be said that a stockholder is necessarily chargeable with notice that the affairs of a corporation are in such condition that they ought not to make a dividend? The propriety of making a dividend at a particular time is a matter to be determined upon consideration of all the circumstances; and these are not usually known by the stockholders. If a dividend is voted unwisely and without strict right at the time on account of no funds, the law would afford a remedy in behalf of an injured party. But may the company itself, after having so voted and paid every stockholder except the plaintiff, no one ever objecting, and after having treated the transaction as valid throughout, and

after all danger from the wrongful policy has passed, say to the last beneficiary of the dividend, the act of voting and paying these dividends in scrip form was unlawful, and you, being a stockholder, thereby participated, and are, therefore, not entitled to the benefit that every other stockholder has enjoyed? It does not appear that the plaintiff had knowledge, or suspicion in fact, that the company, its officers, or its stockholders, designed or transacted anything unlawful or wrong towards any parties or interests in voting to pay dividends in scrip, or in paying the scrip by exchange into bonds, as was done down to the time payment was refused to himself. He had no part, in fact, in what was done by the company. The company decided the question of dividends for itself. It, and all its agents, officers and stockholders, have concurred in all that has been voted and transacted, and have taken the fruits thereof to themselves as matter of lawful right, and by no vote or act have any of said parties denied the validity and good faith of what has been done, until the defence in this suit was asserted.

After this suit was brought the stockholders voted to issue five per cent bonds, secured by mortgage, "to fund the indebtedness of the company, including the outstanding scrip dividends or certificates," and used them for that purpose. The company has more than a million dollars bonded debt created by taking up these certificates, and has devoted its earnings and income to pay the interest on it; and the preferred stockholders have received this benefit. The effect of excluding the plaintiff as to his certificates would be to divide the amount among the preferred stockholders who have already enjoyed the benefit he now claims. We think, upon the facts stated in the report, the company cannot in this suit assert as a defence its wrongful administration. The plaintiff stands in no such equal fault as to warrant a denial of remedy. *Harrington v. Grant*, 54 Vt. 236, and cases there cited.

The defence of alleged want of consideration in the certificates is not available.

The right to dividends, seven per cent, existed under the charter when there should be funds applicable. As before shown, this is a continuing right. The company issued the certificates in settlement. The shareholder took them in settlement. The votes were in effect to pay the dividends in this form. The certificates were taken, and the right to a dividend in any other form surrendered. They were taken in settlement of a claim made by the shareholders, and recognized as valid by the company, and authorized by the terms of the charter. There would be no question but that this would constitute a good consideration if the financial condition of the company had warranted a dividend. *Hayward v. Pilgrim Soc.*, 21 Pick. 276; *Blake v. Peck*, 11 Vt. 483; *Cross v. Richardson*, 30 Vt. 641; *Miller v. Emans*, 19 N. Y. 384; *Plank Road Co. v. Payne*, 17 Barb. 567.

The company having obtained the surrender in the exercise of a power existing under the charter, and having always treated the certificates as resting upon the same consideration as though given in surrender of a dividend actually earned and warranted, cannot, under the facts disclosed, be heard to say that the certificate holders surrendered nothing.

The defendant's counsel make the point and support it by strong argument and great array of authority, that the company had no right to exchange its mortgage bonds for these dividend certificates; that the bonds were authorized and issued for a particular purpose,—a purpose or object expressed in the statute, in the acts in amendment of the defendant's charter, in the resolution of the corporation, and in the eight per cent mortgage itself.

It is plain that the company had no better right to appropriate its bonds to the payment of a dividend not strictly earned than it had to pay in money. There was no absolute right to a dividend in any form before debts were paid. Neither is it clear that the amended charter and the mortgage issued thereunder should be construed as authorizing the exchange of the bonds for these certificates. We make no further expression upon these points, because what has been said upon the subject of ratification and estoppel applies as well here. The stockholders themselves in corporate action have given construction to the act and the mortgage, until they have been benefited under that construction to the amount of a million dollars and more. It is now too late, under the facts reported, for the company to ask for a different, though perhaps better construction, as against the last holder of its obligations of this character.

These certificates, except the first issues, were made payable at the option of the company, but convertible into bonds at the option of the holder. They were all issued from 1872 to 1875 inclusive, and demand made for bonds and suit brought in 1878. As to certificates promising to pay a specified sum with interest, in bonds, on demand, Jones (R. R. Securities, s. 19) says: "If the corporation does not on demand exercise its election to make payment in bonds, the creditor may recover the amount in money; payment in bonds being a privilege for the benefit of the corporation; but if this privilege be not taken advantage of at the proper time, the rule of damages is the principal sum and interest." These certificates are different, but whatever would be the proper construction of them independently, we think the facts of this case bring them within the rule established as to certificates payable in bonds on demand, and this applies to the first issue.

The declaration was in general assumpsit, but the stipulation provides that special counts may be filed. Formerly, especially in England, whenever there was an express or special promise, all implied assumpsits were merged and superseded, and could never

after be resorted to. But this rule has been deviated from, especially in this State. If goods have been sold, work done or money passed, whatever may have been the agreement as to price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count is sufficient. But when the contract is executory and subsisting, and the action is for the breach, for the recovery of damages, then the declaration must be special. *Way v. Wakefield*, 7 Vt. 223. It is settled law in this State that the general counts are sufficient for the recovery on a promissory note payable in specified articles, when payment is not made at the time named. Upon failure to pay as agreed, the note is considered as an obligation for the payment of money alone. *Perry v. Smith*, 22 Vt. 301. This rule was applied in a case of general assumpsit, where the stipulation was to accept a portion of the price of the work in the stock of the defendant company, which was worth only 33 per cent at the time the work was finished. The court say: "The stock of a corporation is but a certificate of such a sum being due the bearer. And where the party stipulates to pay in his own paper, if he refuse, suit may be brought immediately, although the paper was to have been on time, if given. But it was never supposed the party could reduce the money by showing his paper depreciated in the market. This would be virtually giving the difference to the other stockholders. *Barker et al. v. T. & H. R. R. Co.*, 27 Vt. 766; see also *Wainwright v. Straw*, 15 Vt. 219; *Read v. Sturtevant*, 40 Vt. 521; *Bradley v. Phillips*, 52 Vt. 517. Under the decisions in this State we hold the common counts were sufficient.

It is claimed these certificates are not negotiable instruments, hence the plaintiff cannot recover in his own name. They run to the "holder," went on the market, and have always been treated by the defendant as entitling the subsequent holder to the same rights as though payable to bearer. Such has always been the treatment accorded the plaintiff. The remarks of the court in *Hennings v. Rothschild*, 4 Bing. 315 (13 Eng. Com. L., 448), are pertinent: "We do not say whether the receipts were transferable or not. The ground upon which we put the plaintiff's right to recover in this case is this, that whether the original receipts were transferable or not, the defendant has treated the plaintiff as the person holding these receipts, and has undertaken to consider him as the person who originally subscribed the money." So in this case, as these certificates are worded and have been treated, we do not think the plaintiff's right of recovery depends on their negotiability, but, whether strictly negotiable or not, which has not been considered, we think he may stand on them as though he were the original holder. The plaintiff holds by purchase and payment, in his own right, without wrong to the company, the obligation of the company directly to himself as holder. The terms of the paper

imply that it was to be used, recognized and treated, as it has been by the company and third parties, and it should now receive the same recognition by the court. Upon the facts found there would be strong ground for putting the case, if necessary, upon the principle stated in *Moar v. Wright*, 1 Vt. 57; *Buchlin v. Ward*, 7 Vt. 195; and *Hodges v. Eastman*, 12 Vt. 358; in all of which it was held that if the maker of a note expressly promises to pay his note to the holder, the holder might sue on such promise in his own name, though he could not sue on the note by reason of its not being negotiable, or not being legally transferred to him.

The *Cheshire R. R. Co.*, one of the trustees named in the writ, is a foreign corporation. The defendant claims it cannot be held chargeable, first, because the process does not allege that this corporation is operating any railroad or doing any business in this State, or was under any liability in consequence of any debt due or owing in this State, and insists that such jurisdictional fact is necessary to be alleged in the process. The process alleges that the *Cheshire Co.* "has an authorized agent resident within the State of Vermont at Bellows Falls, in the town of Rockingham and the County of Windham and said State of Vermont." Such allegation is sufficient to give the court jurisdiction when service has been made according to the statute. The question whether chargeable follows on disclosure or default. The disclosure filed would make the *Cheshire Co.* chargeable. The defendant filed allegations, charging that the fund to be paid monthly by that company to the defendant had been assigned by the defendant for valuable consideration to one Williams, and that the *Cheshire Co.* had promised to pay it to him. The difficulty with this defence is, that it stands on mere allegation without any proof. Neither does the referee's report, which was agreed to be treated as a commissioner's report in the trustee branch of the case, contain any finding upon this allegation. The liability is left to stand upon the disclosure and the report, and, so far as these show, both trustees are chargeable.

The defendant filed allegations, claiming for reasons therein stated that the *Central Vermont R. R. Co.* should not be held or adjudged chargeable as trustee. The reasons assigned pertain not to any question between the trustee and the defendant (except the assignment to Williams), but to the right of the plaintiff to recover of the defendant. The statute (Gen. Sts., c. 34, s. 16, R. L., s. 1094), provides that either party may allege and prove any facts that may be material in deciding whether the alleged trustee is chargeable. This does not refer to the issues between the principal parties, but to questions as to the liability of the alleged trustee. There being no such question in this case, as it stands on the disclosure and report, said allegations should be dismissed.

The pro forma judgment of the county court is reversed, and

judgment for the plaintiff to recover the amount of his scrip dividend certificates with interest as found by the referee, with interest thereon, and both the Central Vermont R. R. Co. and the Cheshire R. R. Co. are adjudged chargeable as trustees.

Issue of Preferred Stock.—A company may without express charter authority issue preferred to the extent to which its ordinary capital stock is not taken up. *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. A prior subscriber to the ordinary stock will not be released from liability by reason of such issue. *Rutland & Burlington R. R. Co. v. Thrall*, 35 Vt. 536. At least provided he has given his express or implied consent thereto. *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13; *Hoyt v. Quicksilver Mining Co.*, 17 Hun, 169; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

Dividends Payable out of Earnings only.—As a rule dividends on preferred stock are only payable out of bona-fide earnings of the company. *Thompson v. Erie R. Co.*, 45 N. Y. 465; *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Hartford, etc., R. Co.*, 8 R. I. 310; *St. John v. Erie R. Co.*, 22 Wall. 136; *Union Pac. R. R. Co. v. U. S.*, 99 U. S. 402; *State v. Cheraw, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 631; *Elkins v. Camden & Atlantic R. Co.*, 9 Am. & Eng. R. R. Cas. 639; *Nichols v. N. Y., L. E. & W. R. Co.*, 13 Am. & Eng. R. R. Cas. 139. For the construction of special contracts as to preferred stock see *Bailey v. Railroad Co.*, 17 Wall. 96; *Bates v. Androscoggin & Kennebec R. Co.*, 49 Me. 491; *Boardman et al. v. Lake S. & M. S. R. Co.*, 84 N. Y. 157; s. c., 4 Am. & Eng. R. R. Cas. 265.

Lien.—A mortgagee has a superior lien to that of a preferred stockholder. *King v. Ohio & Miss. R. R. Co.*, 9 Rep. 431; *Branch v. Atlantic & Gulf R. R. Co.*, 3 Woods, 481.

How far Preferred Stockholder is Creditor.—A holder of preferred stock is not a creditor strictly speaking. *Nichols v. N. Y., L. E. & W. R. Co.*, 13 Am. & Eng. R. R. Cas. 139. He may, however, enforce payment of his guaranteed dividends out of profits earned, by an action at law. *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491; *Boardman et al. v. Lake S. & M. S. R. Co.*, 84 N. Y. 157; *West Chester & P. R. Co. v. Jackson*, 77 Pa. St. 321; *Nichols v. N. Y., L. E. & W. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 139.

A holder of preferred stock issued in lieu of bonds is a creditor for certain purposes. *St. John v. Erie R. Co.*, 22 Wall. 136; *Rutland v. Burlington, etc., R. Co. v. Thrall*, 35 Vt. 536; *West Chester & Phila. R. R. Co. v. Jackson*, 77 Pa. St. 321; *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491.

Where a holder of preferred stock exercises an option to exchange it for common stock, he ceases to be a creditor. *Burt v. Rattle*, 31 Ohio St. 116. But this is not the case until he exercises his option. *Totten & Co. v. Tisen*, 54 Ga. 139.

Liability.—A preferred stockholder is liable like other stockholders for the debts of the corporation. *Burt v. Rattle*, 31 Ohio St. 116.

Right to Vote.—As to the right of a holder of preferred stock to vote at corporate meetings see *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Burt v. Rattle*, 31 Ohio St. 116; *St. John v. Erie R. R. Co.*, 22 Wall. 136.

Consolidation.—Where two roads consolidate, one of which has issued preferred stock, the new company is liable to pay the guaranteed dividends thereon. *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 563; *Chase v. Vanderbilt*, 62 N. Y. 307.

BRADDOCK

v.

PHILADELPHIA, MARLTON AND MEDFORD R. R. Co.

(44 *New Jersey Law Reports*, 363.)

A suit will not lie on a subscription to the stock of a corporation organized by virtue of the general railroad law, without a previous call made by the directors for the sums so subscribed.

Proof that a notice of a call for the subscriptions by the directors was duly mailed and addressed to a subscriber, made a prima facie case of notice of such call.

Proof that certain of the promoters of a railroad scheme guaranteed that the route would pass near to a certain tract of land, accompanied with proof of a deviation from such line, will not be sufficient to discharge a subscriber who had subscribed in reliance on such statement, there being no evidence tending to show any fraudulent intent.

ON error to the Supreme Court.

Benjamin D. Shreve for the plaintiff in error.

Peter L. Voorhees for the defendant in error.

BEASLEY, C. J.—This was a suit brought by the defendant in error to recover the sum of money subscribed by the plaintiff for a certain number of the shares of the capital stock of the company then about to be organized. The legal questions propounded for solution are exhibited in the bills of exception taken at the trial, and there were three grounds of objection upon which the plaintiffs in error relied for the reversal of this judgment.

The first of such grounds is that there was no call for the sums subscribed legally made by the board of directors of the company.

It is clear that a suit will not lie on a subscription of this kind before such a call has been made. This company is a corporation organized under and by force of the provisions of the general railroad law of this State. By section 7 of that act (Rev., p. 926), it is provided "that the directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in such manner and in such instalments as they may deem proper." In the following clause of this section a particular mode of notification to the stockholder is prescribed in the event of the company's undertaking to enforce the payment of subscriptions by a forfeiture of the stock and of previous payments made by the subscriber. But the former of these clauses, which contains the requisition on the directors to call in the sums subscribed, appears applicable in every case of a proceeding to collect the moneys subscribed. A suit at law will not lie until such call has been duly made. But in the present instance I think the trial

judge was right in his holding that the proofs exhibited the proper action in this respect by the board of directors. The facts on this head were these: Before this company had been organized, certain of the shareholders, assuming to act in the capacity of directors of the corporation, passed a resolution authorizing the president, secretary and treasurer to require the subscribers to the capital stock of the company to pay the amounts respectively subscribed in such amounts, and in such manner and in such instalments, as they may deem proper. This resolution was void, as it was passed in advance of the legal existence of the corporation. But at a subsequent date, and after the due organization of the company, the directors passed a resolution directing the president to take such proceedings toward the collection of subscriptions as would "most speedily and surely accomplish the object." This was plainly a direction to the president to collect, not a part, but the whole of the moneys due from subscribers, and was, in substance, a call for the entire amount of the sums subscribed. A notification to a subscriber of this action of the board could have left him in no doubt on this subject. It seems to me that it would be a useless refinement to hold that in addition to a direction to collect the sums due, the directors must add a statement that they call in such sums. A call is nothing more than an official declaration that the sums subscribed are required to be paid. A direction to collect such sums involves, necessarily, such a declaration. This exception was not well taken.

The second ground of supposed error arose from the instruction of the judge on the subject of the testimony relating to the notification of the plaintiff in error that the moneys subscribed by him had been called in by the directors. But the judicial action in this respect was entirely unobjectionable. The plaintiff proved that a proper notice of this kind was duly mailed, and in answer to this the defendant testified that he did not remember the receipt of such notice. The question whether such notice was in point of fact made out, and was received by the plaintiff in error, was submitted for the decision of the jury. No other course could have been properly taken. Whatever doubts may at one time have existed on the subject, it is now the established rule that a presumption will arise that a paper duly mailed and addressed will reach its destination, and such presumption will not be overcome, as a matter of law, by testimony to the effect that the person to whom such instrument was sent does not remember that it came to his hands. Indeed, if he absolutely testifies that such paper so transmitted was not received by him, the question so presented would still be one of fact and not of law. The course taken in this respect at the trial was correct.

The remaining objections grew out of an offer made by the plaintiff in error, at the close of his adversary's case, to prove cer-

tain matters as a defence, and which offer was overruled by the court. This offer was as follows, viz. :

“ Defendant’s counsel then opened on part of defendant, and offered to prove as follows, viz., that the defendant, Braddock, is a landowner in the southerly part of Medford, and was so in 1879–1880 ; that in the latter part of 1879 a meeting was held in the village of Medford, and speeches were made by Charles D. Freeman, now president, and D. M. Zimmerman, now secretary and treasurer of the Philadelphia, Marlton and Medford R. R. Co., in which statements were made by them that the object of the meeting was the construction of a railroad from Haddonfield to Medford ; that the business of the said railroad would be in the southern part of the village of Medford, and that the route of the road would be on or alongside the road-bed of the proposed railroad from Manchester to Camden ; that defendant owned much real estate in that portion of the village of Medford, and the route of the Manchester and Camden railroad passes through his land ; that the only object of his subscription to said railroad was the advantage he would derive from the passage of said road over his land, as he wished and expected to start a lumber and coal yard ; that on the day of and at the meeting held at Medford, when Freeman and Zimmerman made the above statements and declarations, and after said statements and declarations were made, he subscribed his name to an agreement to take stock in the proposed railroad ; that some time after he subscribed his name to said agreements, late in the afternoon, one Benjamin Cooper came to this defendant, while he was at work in a field, supervising men digging marl, and requested him to sign another paper ; this defendant objected to signing it, stating that he did not have his spectacles and he could not read it without them, and that he did not like to sign a paper without reading it ; Mr. Cooper then assured him that the paper he wished him to sign was just like the one he signed before, and that it was a mere matter of form, and insisted on the defendant signing the paper immediately, as he had to go to get other signatures and it was late in the day, and the paper must be sent to Trenton next day, and upon these assurances and under these representations from Benjamin Cooper, he signed the paper, and and has since learned that the paper he signed was the articles of association ; that the railroad, as constructed, terminates in the northern end of the village, three quarters of a mile from the terminus designated at said meeting in the latter part of 1879, and that defendant owns no property and has no interest in the upper part of the village of Medford ; that he never heard of the change of terminus nor had any intimation of a change thereof until after he had signed the second paper ; that he never, to the best of his knowledge, received any notice of any call being made for the payment of the stock subscribed for by him ; that Benjamin

Cooper, prior to the signing of the second paper, stated to this defendant that the road would go to the south of the village of Medford; that he, Benjamin Cooper, had been to the city of New York to procure the right of way of the Manchester and Camden R. R. Co., and that the road would be built on or alongside the route of the Manchester and Camden R. R. Co. [The whole of the above offer by defendant, as proof in his defence, is overruled, the same not being any defence in this action if proved, except that he may prove that he never received any of the notices to pay.”]

If the whole of the facts here stated had been proved, it is clear that the plaintiff in error would have failed to establish a defence to the suit. Admit that the statements in question as to the projected route of the road at the point mentioned were made and that the road, when laid, did not correspond with such statements, certainly the plaintiff in error could not avoid his liability on that ground. There was no offer to show that such statements were false or fraudulent. Every one knows that in the laying of a railroad deviations from the projected route frequently occur. The law will not impute falsehood, and if the defence consisted in the fact that a fraud was practised upon him, he was bound to offer to prove such misconduct.

With respect to that part of the offer which relates to his signing the paper sued on, in consequence of the statement that it was like the one which he had previously signed, it is sufficient to say that there was no offer to show that the two papers in question were different with regard to their legal effect. How these two instruments varied, or that they varied to his detriment, the plaintiff in error did not proffer himself ready to show. All that we know about these instruments is that he calls one a subscription to stock and the other articles of association. In legal effect they may have been equivalents. This, again, was intended to be a defence on the ground of fraud, and the facts embraced in the offer did not constitute a fraud.

The judgment should be affirmed.

Subscription Conditioned on Location.—It is often the case that subscriptions to the stock of railroad companies are made upon the condition that the railroad is built in a certain locality. A material variation of the route from that locality avoids the contract of subscription. Compliance with the condition is a condition precedent of liability. *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295; *Mansfield, C. & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Parks v. Evansville, I. & C. S. R. Co.*, 28 Md. 567; *Caley v. Phila. & Chester Co. R. Co.*, 80 Pa. St. 363; *Burlington & M. R. Co. v. Boestler*, 15 Iowa, 555; *Spartanburg & W. R. Co. v. De Graffenreid*, 12 Rich (S. C.), 675; *Detroit, etc., R. Co. v. Stames*, 38 Mich. 878; *Hester v. Memphis, etc., R. Co.*, 32 Miss. 378; *Winter v. Muscogee R. Co.*, 11 Ga. 438; *Witter v. Miss., O. & R. R. Co.*, 20 Ark. 463; *Sprague v. Illinois R. R. Co.*, 19 Ill. 174; *New Orleans, etc., R. R. Co. v. Harris*, 27 Miss. 517; *Moore v. Hanover Junction & G. R. R. Co.*, 4 Am. & Eng. R. R. Cas. 256; *Stowell*

v. Stowell, 9 Am. & Eng. R. R. Cas. 338. But see *Delaware R. Co. v. Thorp*, 1 Houst. (De.) 149; *Barrett v. Alton & S. R. Co.*, 18 Ill. 504; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93.

Condition must be in Writing.—Such a condition must, however, be in writing and embodied in the contract of subscription. The subscriber cannot rely upon a parol representation as to the intended location of the road. *Kennebec & B. R. Co. v. Waters*, 34 Me. 369; *White Mtn. R. R. Co. v. Eastman*, 34 N. H. 124; *Conn. & P. R. R. Co. v. Bailey*, 34 Vt. 465; *Ridgely & N. Y. R. R. Co. v. Brush*, 43 Conn. 86; *Tuckerman v. Brown*, 33 N. Y. 297; *Fox v. Alansville, etc., Turnpike Co.*, 46 Md. 31; *Miller v. Hanover Junction R. R. Co.*, 87 Pa. St. 95; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Henry v. Vermilion & A. R. R. Co.*, 17 Ohio, 157; *Scarlett v. Academy of Music*, 46 Md. 132; *Cross v. Peach Bottom R. R. Co.*, 1 Am. & Eng. R. R. Cas. 336. But see *Lawrence v. Smith*, 9 Am. & Eng. R. R. Cas. 604.

Law in New York and Pennsylvania.—In New York such a condition is deemed void as contrary to public policy, because it has a tendency to fix the location of the road so as to subserve private rather than public interests. *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139; *Ft. Edw. & Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 483. See *St. Louis, J. & C. R. Co. v. Mathers*, 9 Am. & Eng. R. R. Cas. 600. And in Pennsylvania, though such a condition will be deemed valid if inserted in a contract of subscription made with the company after the granting of its charter, it will be deemed void if inserted in a contract with commissioners to collect subscriptions entered into prior to the obtaining of the charter. *Bavington v. Pitts. & S. R. Co.*, 34 Pa. St. 358; *Caley v. Phila. & C. C. R. Co.*, 80 Pa. St. 363; *McCarty v. Selinsgrove & N. B. R. R. Co.*, 87 Pa. St. 332; *Boyd v. Peach Bottom R. R. Co.*, 1 Am. & Eng. R. R. Cas. 631; and see *Taggart v. West Md. R. R. Co.*, 24 Md. 563.

PITTSBURGH, WHEELING AND KENTUCKY R. R. Co.

v.

APPLGATE & SON.

(21 *West Virginia Reports*, 172.)

Upon a motion for a change of venue counter affidavits may be read; and if the court is satisfied from all the affidavits or other evidence for and against the motion, that the venue ought to be changed, it will in the exercise of its discretion remove the case, otherwise it will not. The exercise of this discretion is of course reviewable by the appellate court.

Where the name of an individual appears upon the stock-book of a railroad corporation as a stockholder, the presumption is, that he is owner of the stock, appearing in his name; and such book is proper evidence to go to the jury to show, that he was a subscriber to the capital-stock of the corporation.

A subscriber to the stock of a railroad corporation cannot escape his liability to pay his subscription, on the ground that he did not pay the sum required to be paid by the statute at the time he subscribed.

WRIT of error and supersedeas to a judgment of the circuit court of the county of Brooke, rendered on the 20th day of March, 1879, in an action at law in said court then pending, wherein the

Pittsburgh, Wheeling and Kentucky R. R. Co. was plaintiff, and Applegate & Son were defendants, allowed upon petition of said plaintiff.

The facts of the case are fully stated in the opinion of the court.

W. P. Hubbard for plaintiff in error.

John J. Jacob for defendants in error.

JOHNSON, P. J.—In 1873, the plaintiff brought its action of trespass on the case in assumpsit, in the circuit court of Brooke county, against the defendants. In the declaration filed is set out the incorporation of the company and the act of the Legislature of West Virginia incorporating the “Pan-Handle R. R. Co.,” as well as the act giving to the plaintiff all the rights of the said Pan-Handle R. R. Co., and alleging, that the defendants had subscribed for ten shares of the capital stock of the said Pan-Handle R. R. Co. of the par value of ten dollars per share, and that they paid thereon one dollar per share or ten dollars; that said Pan-Handle R. R. Co. had at divers times demanded the payment of the residue of said subscription, which the defendants neglected and refused to pay; that the plaintiff, which had succeeded to all the rights and was subject to all the obligations of said Pan-Handle R. R. Co., had repeatedly after it had proceeded with the construction of said railroad, demanded of said defendants the payment of the balance of said subscription, which they had neglected and refused to pay to the plaintiff to the damage of plaintiff one thousand dollars, etc.

The defendants appeared and demurred to the declaration, which demurrer was overruled; and they then pleaded non assumpsit. The plaintiff, at the March term of said court, 1879, filed some nine affidavits as the foundation for a motion for a change of venue. The ground stated in the affidavits is, that prejudice existed against the plaintiff as to the subject of the suit in Brooke county, to such an extent, that it was impossible for it to have in that county a fair and impartial trial. The motion for a change of venue was resisted by the defendants, and they filed some twelve counter affidavits tending strongly to show, that there was no such general prejudice in said county against plaintiff as to the demand in said action, and that it could have a fair and impartial trial of the issue in said county.

On the 11th day of March, 1879, the court after considering said motion and the affidavits in support thereof together with the counter affidavits, overruled the motion for a change of venue, to which the plaintiff excepted.

On the 20th day of March, 1879, the issue was tried by a jury and a verdict rendered for the defendants. The plaintiff moved the court to set aside the verdict and grant it a new trial, which motion the court overruled, and entered judgment for defendants

for their costs. In a bill of exceptions filed, all the evidence is certified. To the said judgment the plaintiff obtained a writ of error. The evidence as certified sets out the act of the Legislature of West Virginia incorporating the Pan-Handle R. R. Co., and the several acts amendatory thereto, the last of which is an act passed February 16, 1871, which changed the name of the corporation to "The Pittsburgh, Wheeling and Kentucky R. R. Co.," and among other things provided, "that all contracts and liabilities to or from said Pan-Handle R. R. Co. shall be transferred to and rest in the said Pittsburgh, Wheeling and Kentucky R. R. Co., which shall succeed to all the rights and be responsible for all the obligations of the Pan-Handle R. R. Co." It further provided, that all suits then pending on behalf of the Pan-Handle R. R. Co., might be prosecuted without delay, by inserting the name of the new corporation in place of the old, and the case should be tried and decided as though no change had been made.

The plaintiff introduced in evidence the minute-book of the plaintiff and read therefrom the proceedings of a stockholders' meeting held at Wellsburg, March 29, 1869, by which it appeared, that pursuant to a notice inserted for four successive weeks in the newspapers published in said county of Brooke, the meeting was held in the court-house of Brooke county. They proceeded to elect a president and board of directors, etc. On the same day it appeared in evidence, that the board of directors had a meeting, and A. Kuhn was authorized to collect one dollar per share upon the capital stock subscribed. It also appeared from the proceedings of the board of directors at a meeting held on the 13th day of December, 1870, that a committee was appointed to collect the assessment of ten dollars per share, remaining unpaid, and an additional assessment of ten dollars per share was made. It appeared from the evidence of H. G. Lazear, that he was an original subscriber to the capital stock of the company; that he was present at the organization of the company in the court-house of Brooke county, on the 29th of March, 1869; that the stockholders were generally present; but could not say whether the defendants were there, supposed they were, but could not say positively; was present at the meeting on December 13, 1870, when it was decided to collect the first call, so far as it was unpaid, and to proceed and collect the full sum of one dollar per share; was appointed agent to make collections, and as such agent collected one dollar per share from the defendants. This was shortly after he was appointed agent. He told the defendants what his business was, and they paid him one dollar per share amounting to ten dollars. At that time the company were making preparations to open the road. He called on none except stockholders. They were mentioned to him as being stockholders, and they did not deny it; was present at a meeting in Wellsburg, in the court-house, after the organiza-

tion of the Pittsburgh, Wheeling and Kentucky R. R. Co., when the affairs of the company were under discussion; it was a kind of indignation meeting. Joseph Applegate was present and took an active part. The object of the meeting was to denounce the course pursued by the officers of the company. "Those in the meeting were rather going for the president, Mr. Lewis Applegate." He thinks this was in 1874, "some time after the road was broken down."

Joseph H. Pendleton testified, that some time subsequent to or about the time of the organization of the company, the original subscription papers in some way disappeared, and the company and the counsel for the company, have sought to find them but have not been able to do so. But they had a memoranda of the amounts taken on the books of the company. "The papers I say were but the original subscription lists, and I have seen them, and I have seen a subscription list with the name of Applegate & Son on. I can't say whether the names on these lists were copied on to other papers. I saw a book at the trial of Samuel George, with a list in it; never said I saw a list; I said I saw the subscription papers; I can say, that the paper on which I saw the name of Applegate & Son, was the original subscription paper, and the name of W. C. Barclay was on it for the same amount. I don't know that Applegate & Son's name was on original subscription as I don't know his signature. I don't know anything about copied papers; never heard about copied papers until the other trial in court. I speak from original signatures." He further said, that "On the morning of the stockholders' meeting to organize, I assisted Mr. Kuhn to make out a list of subscribers, from which this little book was copied, and then the whole subscription list was copied. . . . Couldn't say whether they were written down just as they were called off or arranged alphabetically. I called some of them from the original subscription papers. There might have been a part written in that book before I began." Mr. Lewis Applegate testified: "I wasn't president then, but the subscription papers were left here by the direction of the secretary, and whatever became of them I never could know. I found the subscriptions all entered on a little book, when I came in; the names and amounts. I searched for the subscription papers. There was a search made in all the papers of the railroad company, but they couldn't be found. There have been a good many inquiries after the papers. Nobody could tell where they went after the road got into operation."

Mr. J. H. Pendleton being recalled, testified: "The time I saw the papers in the possession of Mr. Kuhn, was on the morning of the meeting for organization. The last time I remember seeing them in his possession, was when the list was made out in a little book. I can't say I didn't see them afterwards, but I have no recollection of so doing." After other testimony was introduced, J.

H. Pendleton was again recalled and was handed a book and asked what it was? He replied: "This is a book that I received from Mr. Lewis Applegate, the president of the company, purporting to contain a list of the stockholders of the P. W. & Ky. R. R. Co. It is a list of the stockholders, with the amounts of stock. It belongs to the company." Plaintiff thereupon offered the book in evidence, to which the defendants objected and the court sustained the objection and refused to admit the book in evidence, to which action of the court the plaintiff excepted.

C. D. Hubbard testified, that he was then president of the company and had been a director since 1872. Did not know positively at what time a regular set of books were opened by the company, except from the books themselves. Did not keep the books. Book shown witness he said was the ledger of the company; it contains the stock accounts of the stockholders, "or what he claimed to be such." "There is no other book, to my knowledge, containing such account. The first entry in the book is dated May 31, 1872. Curran Mendel was then secretary. James Campbell succeeded him July 18, 1872. This book has been by the corporation regarded and acted on as the ledger of the company. It is in the handwriting of James Campbell." Thereupon plaintiff offered the said ledger in evidence, to which the defendants objected and the court sustained the objection and refused to allow the said book to go in evidence, whereupon the plaintiff again accepted.

Plaintiff then offered the account of the said Applegate & Son, as stockholders in the plaintiff's company, as such account appeared in such ledger, to the admission of which the defendants objected, and the court sustained the objection and refused to permit the said account to go in evidence, and the plaintiff again excepted.

The plaintiff then proved, that a notice had been duly published, that at a certain time books for receiving subscription to the capital stock of the Pan-Handle R. R. Co. had been opened, and that afterwards, at a meeting of the stockholders held as aforesaid on the 29th day of March, 1869, a majority of the commissioners stated, that twenty thousand dollars or more of stock had been subscribed, and submitted a list of the persons, who had subscribed stock, which was publicly read. It appears by the charter of the Pan-Handle R. R. Co. that they could not organize until at least twenty thousand dollars had been subscribed. To the introduction of which evidence, the defendants objected, and the court sustained the objection and refused to permit the same to go to the jury; and the plaintiff again excepted. After the evidence had all been introduced by the plaintiff, the defendants moved to exclude the plaintiff's evidence on the following grounds, First, that there was no such public notice of the opening of the subscription books as is required

by the statute. Second, that there is no proof that the ten dollars per share required by the statute to be paid at the time of the subscription, was in fact paid, but on the contrary there is proof in the record that it was not paid. Third, there is no proof that the twenty thousand dollars of capital stock, as required by the second section of the Act of July 15, 1868, was subscribed before the company was organized. Fourth, that there was no proof of the incorporation of the company. And the court sustained the motion and excluded the evidence, and the plaintiff again excepted.

The first error assigned is, that the court refused to change the venue, and counsel for plaintiff in error insists, that upon the motion to change the venue, counter affidavits were not admissible. That if the plaintiff by its own affidavits showed ground for such change, it was the duty of the court to order the change without reading affidavits in opposition to the motion.

Sec. 1 of chap. 128 of the Code provides, that "on motion of any party to a suit in a circuit court, the said court may for good cause shown order it to be removed to any other circuit court." There must then exist good cause for such removal, and such cause must be shown to the satisfaction of the court. The court exercises a discretion in this, as it does on the motion for a continuance of the cause. If good cause is not shown, then the court will not remove the case. And in ascertaining whether there was such good cause, it seems to us that it would be strange indeed if the other side were not allowed to show that no such cause existed. The party making the motion might file his own affidavit, and in it show the best of reasons why the venue should be changed, and according to the position here assumed by counsel for plaintiff in error the court could not read in opposition to the motion affidavit that would clearly show that there was absolutely no such reason as appeared in the affidavit, and the court would be bound to remove the cause at the mere caprice of one of the parties to the great inconvenience and expense of the other. Counter affidavits may be filed, and where the court has read all the affidavits pro and con, if it is satisfied that good cause for such removal has been shown, it ought to order a removal of the case; but not otherwise.

Upon a motion for a continuance this court has held, that affidavits in opposition thereto may be read. *State v. Betsall*, 11 W. Va. 727. But it is also insisted, that if all the affidavits filed in this case for and against the motion were read, the motion ought to have prevailed. We have read all the affidavits, and we do not think good grounds were shown for a change of venue in this case. The court properly overruled the motion. The next error assigned is the refusal to admit in evidence the book produced by the witness, Pendleton, purporting to contain a list of the stockholders

of the corporation. It was proved that this was one of the books of the company, as it was also proved that the ledger was one of the books of the company ; but that the first entry was made in the ledger on the 31st day of May, 1872—more than three years after the organization of the company.

Section 25 of chapter 57 of the Code of 1860, which is referred to by and made a part of the charter of the company, provides that "A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof as it regards the company." And section 26 of the same chapter provides that "The president and directors shall issue to each person appearing on the books of the company as owner of any shares of stock fully paid on, a certificate for such shares under the seal of the company, signed by the president, and countersigned by the secretary or cashier."

In *Turnbull v. Payson*, 5 Otto, 421, it was held that "where the name of an individual appears on the stock book of a corporation as a stockholder, the prima facie presumption is, that he is the owner of the stock in a case where there is nothing to refute that presumption; and in an action against him as a stockholder the burden of proving that he is not a stockholder or of rebutting that presumption, is cast upon the defendant. A number of authorities are cited by Mr. Justice Clifford to sustain this position. The book and ledger should have been permitted to go in evidence as tending to show that the defendants had subscribed for stock and that they were stockholders. The presumption that would be thus raised, of course might be rebutted by them, if in their power to do so. As to the refusal of the court to admit the declaration of the commissioners at the meeting called for the organization of the company, that a majority of them stated that the necessary twenty thousand dollars of stock had been subscribed, the court did not err in excluding it, because in an action of this kind the evidence was wholly irrelevant. Such evidence, as well as any evidence tending to show that the company was not legally organized, would be both relevant and material, in a quo warranto proceeding to annul the charter; but such evidence is neither relevant nor material in an action by the company against a subscriber of stock to require him to pay such subscription. 5 Litt. 45; 9 B. Monroe, 71; *Wight v. Shelby R. R. Co.*, 16 B. Mon. 7.

Did the court err in excluding the evidence from the jury? This involves the question whether or not the jury, on the evidence before them, would have been warranted in finding for the plaintiff? The grounds for excluding the evidence were first, that there was no such public notice of the opening of subscription books as is required by the statute. Second, that there was no proof that twenty thousand dollars of the capital stock was sub-

scribed. There is nothing in either of these grounds, upon which a stockholder in a contest as to whether he should pay his subscription or not, could rely. These are grounds that affect the public, and the public only, in a proper proceeding, could urge them. Third, that there was no proof of the incorporation. It is strange that this point should have been made in the face of the charter, which is in the bill of exceptions. Fourth, that there is no proof, that the two dollars per share required to be paid at the time of the subscription was paid; but the record affirmatively shows, that it was not paid.

It is insisted, that where the statute requires a part of the subscription to be paid down at the time, and this is not done, the corporation cannot recover the amount of such subscription from the person so subscribing, and a number of authorities are cited, which fully sustain the position. *Union Turnp. Co. v. Jenkins*, 1 Caine's Cas. 381; *Highland T. Co. v. McKean*, 11 Johns. 98; *Hibernia T. Co. v. Henderson*, 8 S. & R. 219; *Oyle v. Sommerset T. Co.*, 13 S. & R. 256; *Leighty v. Susquehanna Co.*, 14 S. & R. 434; *McRea v. Russell*, 12 Ired. 224; *Greenville R. Co. v. Wood-sides*, 5 Rich. 145; *Vermont C. R. R. v. Claves*, 21 Vt. 30; *Maltby v. N. W. Va. R. R.*, 16 Md. 422; *Starr v. Scott*, 8 Conn. 483; *Crocker v. Craine*, 21 Wend. 211; *Napier v. Poe*, 12 Ga. 170; *Taggart v. Western R. R. Co.*, 24 Md. 563.

The theory upon which it is held, that the company cannot recover from the subscribers in such cases is, that the cash payment not having been made, the subscription is void; that it is a nudum pactum; that there is no mutuality, because it is claimed, that the company would not be bound to deliver the certificate of stock on a subsequent tender of the money. But the cases in our opinion have no solid foundation on which to rest. It is for the benefit of the public, that the statute requires the cash payment to be made; it is required to insure good faith and to avoid shams in those enterprises that so vitally affect the public. But, as between the corporation and the subscribers to the stock, the contract is made at the time of the subscription, and this is a sufficient consideration to support the contract. As is well said by Mr. Thompson, in his work on "Liability of Stockholders" section 107: "A subscription will operate just as effectively to deceive the public into subscribing for other shares or giving credit to the corporation, whether the statutory earnest-money is paid or not. . . . And it seems now firmly settled, that a person cannot discharge himself of the responsibilities of a stockholder, by showing that he had never paid the deposit or first instalment required of every subscriber. By the articles of association, the deed of settlement or the general law, a person will not be thus permitted to take advantage of his own default, to the prejudice of others." This position is well sustained by authority; and it will be seen that the New York courts have

changed their rulings on this subject. *Chesley v. Pierce*, 32 N. H. 402; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Beach v. Smith*, 28 Barb. 254; *Black River, etc., v. Clarke*, 25 N. Y. 208; *Haywood Plank Road Co. v. Bryan*, 6 Jones L. 82; *Hall v. Selma, etc.*, 6 Ala. 741; *Smith v. Plank Road Co.*, 30 Ala. 650; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Wight v. Shelby R. Co.*, 16 B. Mon. 4; *Mitchell v. Rome Railroad*, 17 Ga. 574; *Blair v. Rutherford*, 31 Texas, 465.

It seems to me to hold, that the stockholder is exempt from liability, because he received indulgence from the corporation, is to permit him to take advantage of his own wrong. He has, by his subscription, induced others to take stock and then, when the road is built and in operation, and he thinks it is not a good investment, he will take the advantage of the road which others built and which he encouraged them to build by subscribing to the enterprise himself, and escaped all obligations by pleading his own default. This would permit him to do the very thing as an individual, that the law requiring the cash payment to be made at the time of the subscription which was enacted for the public good, was designed to prevent. Both reason and the better authorities, are in favor of the rule we here adopt: that a subscriber to stock of a corporation, cannot escape his liability to pay his subscription on the ground that he did not pay the required sum at the time he subscribed.

It was shown, by the evidence, and it is uncontradicted, that these defendants upon being approached for a payment on their stock, for which it was alleged they had subscribed, paid without question thereon the amount at that time called, to wit ten dollars or one dollar per share. With this evidence, if the jury had been permitted to pass upon it, and had found for the plaintiff the whole unpaid balance of the alleged subscription, on well-established principles, we certainly would not have disturbed the verdict. The court erred in excluding the evidence.

The judgment of the circuit court is reversed with costs to the plaintiff in error; and the verdict of the jury is set aside and a new trial is granted; and this case is remanded for a new trial to be had thereon according to the principles of this opinion, and further according to law.

Judgment reversed. Case remanded.

Stock—Payment of Instalment on Subscription.—The mere failure of a subscriber to a railroad company's stock to pay the amount fixed by the charter as a necessary condition, does not render the subscription void. The corporation may elect to consider it void but the subscriber cannot set up his own default in a suit brought to enforce his liability. *Wight v. Shelby R. Co.*, 16 B. Monr. 4; *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Klein v. Alton & Sangamon R. R. Co.*, 13 Ill. 514; *Lake Ontario, Auburn & N. Y. R. R. Co. v. Mason*, 16 N. Y. 451; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Selma & Tenn. R. R. Co. v. Rountrel*, 7 Ala. 970. See also cases cited in the opinion.

WALSER et al.

v.

MEMPHIS, C. AND N. W. RY. CO.

(Advance Case, Circuit Court, E. D. Missouri. December 8, 1883.)

A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders.

Where there are two or more plaintiffs and two or more defendants, and one of the plaintiffs and one of the defendants are citizens of the same State, this court has no jurisdiction.

Where a case has been brought here from a State court, no change of pleadings or in the relationship of the parties, by amendments in this court, can give jurisdiction not disclosed by original proceedings in the State court.

MOTION to remand, on the ground that this court has not jurisdiction of this case and the same was illegally removed because the claims and demands of the complainants are several and not joint, and some of them do not exceed the sum of \$500, and because the controversy herein is not wholly between citizens of different States, but on the contrary is between citizens of the same State, and the controversy cannot be severed. For a report of the opinion of the court on a former motion to remand, and a fuller statement of facts, see 6 Fed. Rep. 797.

Joseph Shippen and John P. Ellis for motion.

Broadhead, Slayback & Hauessler for petitioning defendant.

TREAT, J.—A similar motion was made and decided by this court at the March term, 1881, by Judge McCrary, in which I concurred. Since then many proceedings and orders have been improvidently had. It may be that in the recent case of *Barney v. Latham*, 103 U. S. 205, it was supposed that opposite views to those expressed by this court had been established. It seems, however, that after the order of this court to remand the case to the State court and an appeal allowed, a subsequent order was entered vacating said appeal, and leaving open the motion to remand for further consideration. The right to vacate said appeal is questionable. Since that order, an amended bill, a demurrer, and a new motion to remand have been filed. The right to remove the cause was dependent solely upon the condition thereof at the time of the motion made in the State court; and no change of pleading or relationship of the parties, by amendments thereafter in this court, could give jurisdiction not disclosed by the original proceedings in the State court. The opinion by Judge McCrary, in 1881, has been fully confirmed by the many decisions

of the United States supreme court since rendered. It is obvious, therefore, that the cause must be remanded, and all orders made since the original order to remand vacated.

An order will be entered accordingly.

Cf. *Elkins v. Camden & Atlantic R. Co.*, 11 Am. & Eng. R. R. Cas. 572.

DINSMORE

v.

CENTRAL R. Co. et al.

(*Advances Case, Circuit Court, D. New Jersey. December 7, 1883.*)

The objection to a bill that it was not exhibited in good faith, but collusively and in the interests of others, goes to the jurisdiction of the court, and should be raised by plea in abatement and not by answer.

The fact that some of the officials of a rival corporation, with which complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case, will not sustain a charge of bad faith and render his suit collusive.

Upon examination of the bill, answer, and affidavits, no circumstances entitling complainant to a preliminary injunction appearing to exist, the motion, therefore, is denied.

In Equity. Motion for preliminary injunction.

Roscoe Conkling, Clarence A. Seward, Barker Grunmere, and Edward T. Green, for plaintiff.

Neither the act of March 3, 1875, nor the common law gives this court or any court jurisdiction of a suit which is simulated and fictitious, or in which the reus on either side is not the real party in interest. Such suits are called "collusive" (*Gardner v. Goodyear*, 3 O. G. 295), and when the collusion is proved the case is summarily dismissed as not within the proper jurisdiction of the court. *American M. P. Co. v. Vail*, 15 Blatchf. 315; *Cleveland v. Chamberlain*, 1 Black, 426; *Lord v. Veazie*, 8 How. 254.

The allegation of collusion—that is, the want of real interest in one of the actors—is an allegation that the court has no jurisdiction by reason of the character in which one of the parties sues or defends. This exception to the jurisdiction is called by the courts a "personal" exception; asserts that the position of a litigant is assumed, and that the party is not an honest reus or actor. *Forrest v. Manchester, etc., Ry. Co.* 4 De G., F. & J. 131; *Colman v. Easter Cos. Ry. Co.* 10 Beav. 1; *Salisbury v. Metropolitan Ry. Co.*, 38 L. J. Ch. 251.

That a suit is collusive must be objected to by plea in abatement, and if a defendant answers upon the merits he waives the

objection, and cannot thereafter contest the jurisdiction. Story, Eq. Pl. § 721; Daniell, Ch. Pr. (15th ed.) 630; Underhill v. Van Cortlandt, 2 Johns. Ch. 339, 367; Conard v. Atlantic Ins. Co. 1 Pet. 386, 450; Dodge v. Perkins, 4 Mason, 435; D'Wolf v. Rabaud, 1 Pet. 476; Wood v. Mann, 1 Sumn. 581; Evans v. Gee, 11 Pet. 85; Rhode Island v. Massachusetts, 12 Pet. 719; Nesmith v. Calvert, 1 Wood. & M. 37; Brown v. Noyes, 2 Wood. & M. 81; Webb v. Powers, id. 510; Sims v. Hundley, 6 How. 1; Bailey v. Dozier, id. 30; Smith v. Kernochen, 7 How. 216; Sheppard v. Graves, 14 How. 509; Wickliffe v. Owings, 17 How. 51; Jones v. League, 18 How. 76; Dred Scott v. Sandford, 19 How. 397; Whyte v. Gibbes, 20 How. 542; De Sobry v. Nicholson, 3 Wall. 423; Van Antwerp v. Hulburd, 7 Blatchf. 427; Pond v. Vermont V. R. Co., 12 Blatchf. 297; Gause v. Clarksville, 1 Fed. Rep. 355; Kern v. Huidekoper, 103 U. S. 485; Williams v. Nottawa, 104 U. S. 211; Equity Rule, 39; Livingston's Ex'r v. Story, 11 Pet. 351, 393.

B. Williamson, George M. Robeson, Franklin B. Gowen, James E. Gowen, A. C. Richey, and G. R. Kaercher for defendants.

NIXON, J.—Two questions are presented for the consideration of the court—the first having reference to the bona-fide character of the suit, and the second, to the propriety of the interference of the court, under the present aspect of the case, by ordering a preliminary injunction.

The answer of the defendants, after responding to the material allegations of the bill, charges that the bill of complaint was not exhibited in good faith, or for the honest purpose of asserting the complainant's rights as a stockholder of the New Jersey Central R. R. Co., but in the interests of a rival company to the Philadelphia & Reading and the New Jersey Central roads. This is an exception personal to the complainant, and going to the jurisdiction of the court, and if introduced into the pleadings for contestation, it should have been by a plea in abatement. It has no proper place in the answer, and is always regarded as waived after the defendants have answered upon the merits. But as a very large amount of testimony has been taken upon the subject, I have deemed it best to lay aside all technical objections to the informal manner in which the matter has been presented, and to ascertain, if possible, whether the defendants have sustained their allegations by their proofs. After a careful examination of the testimony furnished, I am of the opinion they have not sustained them. The most that has been done is to show that some of the officials of a rival company, with which the complainant has close business relations, have been friendly and active in giving him aid in the preparation of his case. I have never understood that a law-suit is of such an exclusive and sacred character that parties may not

have the sympathies and accept the aid of associates and friends in carrying it on without subjecting themselves to the charge of collusion.

With regard to the second point, the learned counsel, on the argument, took even a wider range than the testimony, and much time was spent in the discussion of questions that more appropriately belong to the final hearing. I do not propose to follow them now. Without intending to intimate any opinion on the merits of the controversy, it is sufficient for my present purpose to say, that, looking at the bill, answer, and affidavits, which furnish to the court the evidence on which to act on the question of a preliminary injunction, I find no circumstances existing and no facts developed which, in my judgment, authorize me to interfere, at this stage of the proceedings, by ordering such an injunction to issue.

The motion is therefore denied, but without prejudice to the complainant to renew it if any subsequent acts of the defendants, before final hearing, should render its renewal necessary or proper.

LEO

v.

UNION PACIFIC RY. CO.

(Advance Case, U. S. Circuit Court, S. D. New York. January 24, 1884.)

The bill of the plaintiff, a stockholder in the defendant corporation, brought to restrain the corporation from employing its assets in excess of its corporate powers, *held* insufficient on demurrer on the ground that the allegations and statements should be more specific to show good cause for the relief sought.

In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits.

Those who become members of a corporation consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond such powers depends upon the want of consent, if the consent is given the right ceases. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief.

In Equity.

George Zabriskie and John E. Burrill for orator.

John F. Dillon for defendants.

WHEELER, J.—This cause has been before heard on a motion for a preliminary injunction. It has now been heard on demurrer to the bill. The question then was whether the defendants should

be restrained pending the litigation; it now is whether there is anything in the bill which they ought to answer. The bill is brought by a stockholder to restrain the corporation from employing its assets in excess of its corporate powers; the other defendant is joined as president of the corporation for discovery merely, and no bad faith is alleged or charged. The prayer is that the corporation and its officers and agents be restrained, and for further relief. Any relief for the orator here must be wholly preventive. He could not, and does not ask to, undo what has been done. The avails of it, if held by the corporation, can only be reached through dividends common to all stockholders; if by others, only by proceedings against those who have them.

According to the bill, which is now to be taken as true, the corporation is made up of the Union Pacific R. R. Co., the Kansas Pacific Ry. Co., and the Denver Pacific Ry. & Telegraph Co. The Union Pacific R. R. Co., before the consolidation, having a definite line of road, exceeded its powers if what is now sought to be restrained is an excess, and in the same manner, by lending and advancing moneys to other railroad companies to be used in the construction, maintenance, and operation of their roads, and entered into obligations to furnish further amounts, and received in payment of moneys furnished from time to time stocks and bonds of such roads. Since the consolidation the same course has been pursued; stocks and bonds to which the Union Pacific R. R. Co. would have been entitled, have been received by the defendant, and it has lent and advanced its moneys and credit to the same and other organized railroad corporations for the purpose of, and of aiding in, the construction, maintenance, and operation of their roads. There is no description of the corporations so aided, except that the corporate names of some are stated without their source, whether from State or National authority, and some are stated to be unknown; nor of their lines of road except as branch and connecting roads. Nor is there any statement of the amount of such aid or of the payments therefor, except that it is stated as appearing from the report of the government auditor that the amount of stocks and bonds received from other roads was, by the Union Pacific R. R. Co., June 30, 1878, \$5,229,327.84; June 30, 1879, \$7,534,243.91; by the defendant, June 30, 1880, \$15,338,453.94, and that the orator is informed and believes that the defendant now holds of such bonds \$23,749,230.40, and of such stocks, \$29,462,046.98. The orator has at different times been a stockholder to a large amount in the defendant company. He acquired his present stock, November 17, 1882; commenced to object to this course of the defendant the next day, and brought this suit December 22, 1882. In the amended bill now under consideration, it is alleged that at a general meeting of the stockholders, held March 9, 1883, at which the holders of 384,769 shares were pres-

ent or represented, this course was unanimously approved of. Whether the orator was present at that meeting is not stated; neither is any effort by him with the stockholders, either separately or at any meeting, to induce them to change or desist from this course, set forth, or any attempt to stop it shown, except notifications and protests to the officers and agents of the company.

The orator could not, and does not claim to, have any right to relief on account of his former ownership of stock. Having parted with that and all rights belonging to it, he gained this as a new acquisition, and has such rights as appertain to him as the owner of it as he acquired it. There is no doubt, and no question is really made, but that a stockholder or partner in an enterprise has the right to prevent taking his interest into another and different enterprise without his consent. In corporations within the scope of the corporate authority the majority rules; beyond this they have no right to go, and one may insist upon stopping at the limits. *Colman v. Eastern Cos. Ry. Co.* 10 Beav. 1; *Salomons v. Laing*, 12 Beav. 339; *Beman v. Rufford*, 4 Eng. Law & Eq. 106; *Stevens v. Rutland & B. R. Co.* 29 Vt. 545. This right to stop the majority at the bounds of corporate power rests upon the control which every one has over his own property. Those who become members of a corporation, consent to the rule of the majority within the powers of the corporation, but not beyond. As the right to restrain going beyond depends upon the want of consent, if the consent is given the right must cease. Therefore, when such restraint is sought, due diligence, in the proper direction, to prevent what is sought to be restrained, must be shown as a part of the title to relief. *Kent v. Jackson*, 14 Beav. 367; *Gregory v. Patchett*, 33 Beav. 595. The exercise of the rights of a stockholder to influence corporate action by vote and speech in corporate meetings, when opportunity was presented or could be had, would lie in the proper direction. Until such means should be exhausted or prevented, there would be no real oppression of the minority by the majority. *Hawes v. Oakland*, 104 U. S. 450. The transactions of which the orator complains, and the continuance of which he is seeking to prevent, have been going on in the Union Pacific R. R. Co. since long before, and in the defendant company ever since, the organization of the defendant company. As he had been a stockholder before, and has derived his knowledge of what was being done from the auditor's reports, open to all stockholders at least, he must have known what had been and was being done in these respects when he purchased this stock and assumed his present status in the company. He does not allege that he was in anywise ignorant of these things. His vendor is not shown to have in all this time objected, and must be taken to have acquiesced. He purchased this stock knowing that the company was engaged in the enterprises he seeks to stop, and by taking it he

consented to become a member of a corporation so engaged. Large outlays had been made, great liabilities had been incurred, and embarrassing complications would necessarily follow, stopping them in the midst. It would seem to be highly inequitable and unjust to allow such a small minority to step in and arbitrarily stop the great majority, acting in good faith, honestly even if mistakenly, and in strictness outside of their authority. If the company was about to undertake a new enterprise not involved with these which have been so long prosecuted, and outside of its corporate powers, such as building a new line of road or purchasing the stock of another line, so as to control it, and thereby extend its lines beyond its charter, the case might be very different.

It does not distinctly appear that the transactions in question are outside of the powers of the corporation. The Kansas Pacific Ry. Co. was a Kansas corporation, with powers amply sufficient, under the laws of that State, to do within that State all that is complained of as being done somewhere by the defendant. Comp. Laws Kan. § 4091. This corporation was consolidated with the others as it was, and as they were, and it is not easy to see any reason why the corporate powers of each were not carried into the consolidated company. *County of Scotland v. Thomas*, 94 U. S. 682. Not that the consolidated company has powers in all the States and Territories where it exists co-extensive with those of the Kansas Pacific in Kansas, but it may have in Kansas all the powers which the Kansas Pacific had there. If it has, all these transactions may be, so far as the bill shows, in that State, and within the powers authorized to be exercised there. The names of the corporations are given, but they are private corporations, although created for public purposes, and judicial notice cannot be taken of their location. Although the defendant is merely a railroad corporation, it must, from its nature and circumstances, have large implied powers, which are as well conferred as its express powers. *Nat. Bank v. Graham*, 100 U. S. 699. It is burdened with vast debts, which it was fully authorized to assume, falling due in such immense sums at a time that the ordinary revenues would be wholly inadequate to meet them. Large accumulations and investments must be made long beforehand, involving great financial transactions. Operations must be had wholly foreign to the management of the railroads themselves, and pertaining much more to the business of banking than that of a carrier. These operations, if entered into for the purpose of carrying on a banking business, would be wholly outside of the corporate power; but when done for the purpose of fulfilling the financial duties of the corporation, must be clearly within them. The purchase of the stocks and bonds of other railroads might be for this legitimate purpose as well as the purchase of government or other corporate

securities. The orator has not shown that the purchases of stocks and bonds may not be of this proper class.

All these statements and allegations are in very general terms. Excess of chartered powers, in progress or intended, is in no particular pointed out. A decree according to the prayer of the bill would be scarcely, if any, more than a general injunction against going outside of the charters. Something more specific, and so specific that the court can see that it is unwarranted by the law of the existence of the corporation, and wrongful to the orator as a member of it, should be pointed out distinctly. The bill, as now considered, does not appear to be sufficient to require an answer.

The demurrer is sustained, and the bill adjudged insufficient.

See next case and note.

DU PONT

v.

NORTHERN PACIFIC R. Co. et al.

(Advance Case, U. S. Circuit Court, S. D. New York. November 21, 1882.)

An action by a shareholder against a corporation, to restrain it from a contemplated transaction which is ultra vires, may be maintained by the stockholder, and must be sanctioned by the court, although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action; but in a case of evident expediency, and where there is no attempt to go beyond the power conferred, a court of equity will not be swift to grant the stringent relief of a preliminary injunction to a stockholder assailing transactions in the corporate affairs of which the other stockholders do not complain, and to which they have given their consent.

In Equity.

John E. Parsons and E. Ellery Anderson for complainant.

George Gray, Joseph H. Choate, and Artemas H. Holmes for defendants.

WALLACE, J.—This suit was commenced in a State court, and an order obtained restraining the defendants from the acts sought to be enjoined until the hearing of an order to show cause why a preliminary injunction should not be granted. The action having been removed to this court, the motion to vacate the restraining order has been heard as a motion, in substance, by the plaintiff for a preliminary injunction.

The plaintiff is a stockholder of the corporation defendant, having become such on or about the day when he commenced this ac-

tion. The suit is brought against the corporation and its directors, individually, to obtain a decree adjudging that the corporation has no lawful right or power to create the \$20,000,000 of second-mortgage bonds which its directors propose to issue, and to enjoin the defendants from creating the same. The plaintiff also prays in his bill that the defendants be restrained from applying the proceeds of such mortgage, if they are permitted to create the same, to the payment of any indebtedness, or for any purpose other than the construction and completion of the railroad of the corporation. He also prays for a decree against the individual defendants for the value of the stock of the corporation alleged to have been misapplied by them, and of a scrip dividend on the preferred stock of the corporation alleged to have been wrongfully declared by them, and for an accounting and payment of moneys alleged to have been wrongfully appropriated by them for the construction of branch and terminal lines of railroad, and for other purposes not permitted by law.

The bill sets forth with particularity concerning the several alleged misappropriations of corporate funds and property by the directors which are assailed, but, for reasons which will be hereafter stated, it is not deemed necessary, for the purposes of the present decision, to consider them in detail.

Some general facts relative to the history, organization, and present position of the corporation should be stated in order to understand the questions involved in the present controversy. The present corporation is a company reorganized after the foreclosure of a mortgage created and issued by the original Northern Pacific R. R. Co. The original corporation was created by an act of Congress passed July 2, 1864. The act authorized a continuous railroad between Lake Superior and a point on Puget Sound, with a branch through the valley of the Columbia River to Portland, Oregon. The tenth section of the act provided that no mortgage or construction bonds should ever be issued by the company on said road, or mortgage or lien made in any way, except by the consent of the Congress of the United States. The act granted to the company, its successors and assigns, for the purpose of aiding in the construction of the railroad, alternate sections of public lands to the amount of twenty sections per mile on each side of said railroad line through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad line through any State. By a joint resolution of both houses of Congress of March 1, 1869, the consent of Congress was given to the company to issue its bonds, and secure the same by mortgage upon its railroad and telegraph line, for the purpose of raising funds with which to construct its railroad and telegraph lines. This consent was not sufficiently broad, as it did not extend to the franchises of the company, or to the lands other than those

necessary for the operation of its road and telegraph line, but by joint resolution of May 31, 1870, it was declared "that the Northern Pacific R. R. Co. be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all descriptions, real, personal, and mixed, including its franchises as a corporation." Thereafter the company mortgaged all its property and franchises for \$30,000,000. In 1875 this mortgage was foreclosed, and all the property and franchises were sold under a decree of foreclosure to a committee of bondholders, who took a deed, and subsequently conveyed the same to the reorganized company. By the terms of the reorganization agreement, the stock of the new corporation, to the amount allowed by the act of incorporation, was divided into \$51,000,000 of preferred stock, and \$49,000,000 of common stock; and it was provided that first-mortgage bonds to an amount not exceeding \$25,000 per mile of completed road should be issued to complete and equip the road; and it was further provided that no other mortgage bonds should be issued except on a vote of at least three fourths of the preferred stock at a meeting specially called and held in reference thereto. The first mortgage contemplated by the reorganization agreement was executed and is now outstanding, and there was unpaid thereon October 1, 1883, the sum of \$42,727,000. The present corporation proceeded to construct and equip the railroad, and on the seventeenth of October, 1883, the directors issued a notice to the holders of preferred stock in which they represent that there is now required \$9,459,920 to provide for the present unfunded debt of the company beyond the cash means available for that purpose, and that the additional sum of \$5,500,000 will be required to complete the construction of the line and road now under contract; that they favor the execution of a mortgage on the property and franchises of the company for \$20,000,000; that they can negotiate fifteen millions thereof with a syndicate composed of three banking firms, at a price of 87½ cents per dollar cash, less 5 per cent commissions, with a six months' option to take three millions more on the same terms; that the sale of the bonds at that price will enable the company to meet all existing liabilities for construction and equipment requirements, and leave a reserve of \$1,100,000 of the bonds in the treasury. The directors have called a meeting of the preferred stockholders, and have given notice that they propose to create the bonds and mortgage if authorized to do so by the vote of such stockholders.

It is not claimed by the plaintiff that the directors propose to create the bonds and mortgage without obtaining the requisite vote of three fourths of the preferred stockholders. This being the situation, it is apparent that the only question that it is necessary to consider is whether or not the defendant should be

enjoined from creating the proposed issue of second-mortgage bonds, or from appropriating the avails of the bonds, if issued, to the purposes intended by the directors. If the directors in the past have diverted the funds or property of the corporation into illegitimate channels, whether for purposes that are beyond the corporate powers, or for purposes within these powers, but contrary to their duties as trustees, all of which it is proper to say is emphatically denied by them, it may nevertheless be true that what they now propose to do is not only expedient, but essential and vital in the interests of the corporation and stockholders. If, as is insisted for the plaintiff, the corporation has no power to create the mortgage proposed, it must be held that the plaintiff is entitled to the injunction asked for.

An action by a shareholder against a corporation to restrain it from a contemplated transaction which is ultra vires may be maintained by the stockholder, and must be sanctioned by the court, although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action. In such a case the question is not one of discretion or expediency. The right of the stockholder to maintain the action and enjoin the transaction is personal to himself and independent of any right or interest of the corporation, and must be recognized, although all the other members are arrayed against him. Upon this branch of the controversy the contention for the plaintiff is that the joint resolution of Congress was a privilege to the original corporation only, and did not pass to the present corporation upon the reorganization, and that, further, in any event, it only permitted a single mortgage to be created, and the power was spent upon the creation of the first mortgage. This seems to be an astute rather than a reasonable interpretation of the language of the joint resolution. The purpose of including the right to mortgage the franchises of the corporation in the consent of Congress was palpably in order that a purchaser under a foreclosure might succeed to all the rights and privileges of the original corporation. As there was no restriction in that consent respecting the amount for which a mortgage might be created by the corporation, or relating to the scope or character of the mortgage, the implication seems not only fair, but irresistible, that Congress intended to leave all this to the discretion of the corporation itself, to be exercised in view of the exigencies of the undertaking. Obviously, Congress was quite indifferent whether the mortgage should be a large one or a small one, whether it should cover the whole or a part of the property of the company, or whether all the bonds to be secured should be issued at one time or in one series or class. The power conferred is limited only by the purpose expressed, that the bonds are to be issued to aid in the construction and equipment of the road, and are to be secured by mortgage.

The conclusion being reached that the corporation may lawfully create the proposed mortgage, the question then arises whether, under the particular circumstances of the case, the directors should be restrained from exercising their discretion in that behalf. All the allegations of the bill respecting the past misconduct of the directors are fully met and denied by the answer of the defendant, and it is asserted by them unequivocally that the avails of the mortgage are to be, and must of necessity be, applied to discharge the liabilities of the corporation for the construction and equipment of the road, and that bonds to a moderate amount are not to be negotiated at present, but are to be retained to provide against contingencies. While it is true, as alleged by the plaintiff, that three of the directors are members of the syndicate to whom it is proposed to sell the bonds, it is not alleged that the price for which they are to be sold is inadequate or less than could be obtained elsewhere. If it should be assumed that the plaintiff may ultimately sustain the allegations of the bill respecting the past transactions which he assails, the fact cannot be gainsaid that the corporation is now largely indebted, that it has no resources practically available, and must raise the means to meet its liabilities and complete the construction and equipment of its road. The directors propose to take such action only as shall be sanctioned by the requisite vote of the preferred stockholders. By the agreement of reorganization, to which every stockholder is a consenting party, the power to represent all, when it is proposed to create a second mortgage, is lodged in the preferred stockholders. It is delegated to them, and to them alone, to determine whether, in view of all the circumstances of the situation, the interests of the corporation will be best subserved by the creation of such a security. If their consent is fairly obtained it is conclusive. The plaintiff cannot be heard to complain if they are satisfied.

It may be proper to state in conclusion that a court of equity will not be swift to grant the stringent relief of a preliminary injunction to an officious plaintiff who seems to have acquired his interests as a stockholder with a view of assailing transactions in the corporate affairs of which existing stockholders do not seem to have complained. The purchaser of a law suit is entitled to what he has bought, and may insist that his rights shall be recognized and enforced according to the settled principles of law and the rules of procedure which obtain, irrespective of the motive of the litigant; but he can only insist that such preliminary relief be granted as is absolutely indispensable to preserve rights that cannot be adequately protected at the ultimate decision of the case.

The restraining order is vacated and a preliminary injunction refused.

Injunctions to Restrain Ultra Vires Corporate Acts.—A court of equity will interpose to prevent a board of directors of a corporation from misapply-

ing its funds or performing any other ultra vires act. *Kean v. Johnson*, 1 Stockt. 401; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 717; *Ernest v. Nicholls*, 6 Id. 401; *Dodge v. Woolsey*, 18 How. (U. S.) 881; *Davenport v. Down*, 18 Wall. 626; *Hersey v. Veazie*, 24 Me. 9; *Smith v. Hurd*, 12 Metc. 371; *Allen v. Curtis*, 26 Conn. 456; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Same v. Same*, 48 N. H. 515; *Lauman v. Lebanon*, 80 Pa. St. 46; *Samuel v. Holladay*, 1 Woolw. 400; *Heath v. Erie R. R. Co.*, 8 Blatch. 847; *Brewer, etc., v. Proprietors*, 104 Mass. 378; *Brown v. Vandyke*, 4 Halst., 795; *Butts v. Woods*, 38 Barb. 181; a. c., 37 N. Y. 317; *Burke v. Railroad Corp.*, 8 Am. & Eng. R. R. Cas. 552.

Will Lie at Suit of Stockholders.—Relief will be afforded at the instance and application of a single stockholder against any improper alienation of the corporate funds. Equity will in such case restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company or a wrongful diversion of its funds. High on Injunctions, § 767; *Manderson v. Commercial Bank*, 28 Pa. St. 379; *Sears v. Hotchkiss*, 25 Conn. 171; *Bagshaw v. Eastern, etc., Ry. Co.*, 7 Hare, 114; *Coleman v. Same*, 10 Beav. 1; *Gifford v. N. J., etc.*, 2 Stockt. 171; *Simpson v. Westminster, etc.*, 8 H. L. Cas. 317; *Bissell v. Michigan, etc., Railroad Co.*, 22 N. Y. 258; *Fisk v. Chicago, R. I. & P. R. R. Co.*, 53 Barb. 518.

The same principle applies wherever the directors threaten to perform acts or to enter into contracts which are clearly ultra vires. *Balfour v. Ernest*, 5 C. B. (N. S.) 601; *Zabriskie v. Hackensack, etc., R. R. Co.*, 8 Id. 178; *Black v. Delaware, etc., R. R. Co.*, 7 C. E. Green, 120; *Kean v. Johnson*, 1 Stockt. Ch. 401; *Bliss v. Anderson*, 31 Ala. (N. S.) 618; *Belmont v. Erie R. R. Co.*, 52 Barb. 637; *Memphis v. Dean*, 8 Wall. 64; *Zabriskie v. Cleveland, etc., R. R. Co.*, 23 How. 381; *Attorney-Gen'l v. Eastlake*, 11 Hare, 205; *Greenwood v. Union Freight R. R. Co.*, 9 Am. & Eng. R. R. Cas. 526; *Elkins v. Camden & Atlantic R. R. Co.*, 9 Am. & Eng. R. R. Cas. 590; *Burke v. Railroad Corp.*, 8 Am. & Eng. R. R. Cas. 542; *Du Pont v. Northern Pac. R. Co. et al.* and note supra.

But see *Pond v. Framingham, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 551; *Matthews v. Murchison et al.*, 9 Am. & Eng. R. R. Cas. 698.

DIMPFL

v.

OHIO AND M. RY. CO.

(Advance Case, Supreme Court of the United States. January 21, 1884.)

A stockholder in a railroad corporation cannot set aside the transactions of its directors unless he held his interest at the time of the proceeding complained of, nor unless he has exhausted all the means within his reach to obtain redress without resort to a court of law.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

C. W. Hassler and Thos. N. McCarter for appellants.

Edgar. M. Johnson and Benj. Harrison for appellees.

FIELD, J.—This suit was brought to set aside a contract by which the Ohio & Mississippi Ry. Co. became the owner of a portion of its road known as the Springfield Division, and to obtain a decree from the court declaring that the bonds issued by the company, and secured by a mortgage upon that division, are null and void. It was commenced by Dimpfel, an individual stockholder in the company, who stated in his bill that it was filed on behalf of himself and such other stockholders as might join him in the suit. Callaghan, another stockholder, is the only one who joined him. The two claim to be the owners of 1500 shares of the stock of the company. The whole number of shares is 240,000. The owners of the balance of this large number make no complaint of the transactions which the complainants seek to annul. And it does not appear that the complainants owned their shares when these transactions took place. For aught we can see to the contrary, they may have purchased the shares long afterwards, expressly to annoy and vex the company, in the hope that they might thereby extort, from its fears, a larger benefit than the other stockholders have received or may reasonably expect from the purchase, or compel the company to buy their shares at prices above the market value. Unfortunately, litigation against large companies is often instituted by individual stockholders from no higher motive. But assuming that the complainants were the owners of the shares held by them when the transactions of which they complain took place, it does not appear that they made any attempt to prevent the purchase of the additional road, and the issue by the company of its bonds secured by a mortgage on that road. We are not informed of any appeal by them to the directors to stay their hands in this respect, nor of any representation to them of a want of power to make the purchase and issue the bonds, nor of any probable injury which would arise therefrom. The purchase was made in January, 1875, and this suit was not commenced until September 12, 1878. In the mean time, the new road purchased was operated as an integral part of the line of the Ohio & Mississippi Ry. Co., without objection from any stockholder. During these three years and eight months the earnings of the new road went into the treasury of the company, and the bonds issued upon the mortgage of that road, executed by the company in payment of its purchase, passed into the hands of parties who bought them on the faith of contracts which had been carried out without complaint from any one. Objections now come with bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction. The purchase and the issue of the bonds were public acts known to them, and presumably to all the stockholders.

A stockholder must make a better showing of wrongs which he has suffered, and also of efforts to obtain relief against them, be-

fore a court of equity will interfere and set aside the transactions of a railway company or of its directors. It is not enough that there may be a doubt as to the authority of the directors or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and before an individual stockholder can be heard he must show, in the language of this court, that "he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes." *Hawes v. Oakland*, 104 U. S. 450. In that case the court added that the efforts to induce such action as he desired on the part of the directors or of the stockholders, when that was necessary, and the cause of his failure, should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law. According to the rule thus declared, and its value and importance are constantly manifested, the complainants have no standing in court, and the demurrer was properly sustained for want of equity in the bill.

This view renders it unnecessary to consider whether, as held by the court below, the railway company had the right to acquire the Springfield Division and to execute the mortgage and issue the bonds mentioned by virtue of the legislation of Illinois. The complainants have not shown any ground which would justify the court, on this application, to inquire into the validity of the transaction.

Decree affirmed.

See *Leo v. Union Pacific R. Co.*, and note, *supra*, and *Du Pont v. Northern Pacific R. Co.*, and note, *supra*. Cf. *In re Syracuse, C. & N. Y. R. R. Co.*, 90 N. Y. 1.

BROWN v. FLORIDA SOUTHERN RY. CO.

FLORIDA SOUTHERN RY. CO v. BROWN.

(19 *Florida Reports*, 472.)

An original incorporator in Florida Southern Ry. Co., first known as Gainesville, Ocala, and Charlotte Harbor R. R. Co., was not as such, independent of a contract with the directors of the company, entitled under the charter of the corporation, on the common law controlling the subject, to a proportion of the stock, to be determined by the number of original incorporators named in the articles of incorporation.

A grant of land by the State of Florida to a corporation having power to make contracts for the purpose of accomplishing corporate purposes is not a grant to the original incorporators signing the articles authorized by the

general law of this State in the proportion in which they have subscribed for stock, nor does it authorize a division or an allotment of the land to the original incorporators.

Stock is originally acquired in a corporation by a subscription therefor. This subscription is a contract defined and regulated by the organic law of the corporation. An incorporator is not entitled to stock as a mere gratuity. He can only acquire it by purchase or by subscription therefor, by which he contracts to pay calls and assumes the other liability to creditors and the company which such relation imposes.

APPEAL from the Circuit Court for Alachua County.

The bill of complaint treats The Florida Southern Ry. Co. (the defendant) as the successor of The Gainesville, Ocala, and Charlotte Harbor R. R. Co., praying process against "the defendant, The Florida Southern Ry. Co., formerly The Gainesville, Ocala, and Charlotte Harbor R. R. Co." The Gainesville, Ocala, and Charlotte Harbor R. R. Co. was incorporated under the "act to provide a general law for the incorporation of railroads and canals," approved February 19, 1874, Ch. 1987, Laws of Florida.

Sections 1, 2, 3, and 5, of the act of March 4, 1879, granting lands to The Gainesville, Ocala, and Charlotte Harbor R. R. Co. (Ch. 3167, Laws of Florida) are as follows:

Sec. 1. That the State of Florida hereby grants to the Gainesville, Ocala, and Charlotte Harbor R. R. Co. the alternate sections of the lands granted to the State of Florida by the United States under act of Congress of September 28, 1850, lying on each side and within six miles of a line of railroad to be constructed by said company, to commence at Lake City, in Columbia county, and run in a southerly direction through or near Gainesville, in Alachua county, Ocala, in Marion county, Leesburgh, in Sumter county, and Brooksville, in Hernando county, to the waters of Tampa bay, with one branch from some point in Sumter county through or near Bartow, in Polk county to the waters of Charlotte Harbor, in Manatee county, and another branch to Palatka, in Putnam county; Provided, however, The said company shall comply with the provisions of the act entitled "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6, 1855, and the amendments thereto, as to the manner of constructing the roads and drainage; Provided, however, That nothing herein shall prevent such company from adopting such gauge as it may choose.

Sec. 2. That if the said company shall so amend its charter as to authorize it to construct any part of the line mentioned above and not covered by its charter, then the said company shall be entitled to, and the State hereby grants, the alternate sections within the limit of six miles aforesaid of and along the line of such road, branches, or extensions, on the terms and conditions aforesaid.

Sec. 3. That upon the completion of the grading and laying on the cross-ties of ten miles of said road, its branches, or extensions,

the title to the said alternate sections opposite said ten miles of road so graded and furnished with cross-ties shall vest in said company, and a deed therefor shall be issued by the trustees of the Internal Improvement Fund to the said company; Provided, however, that for every forty miles of road so graded and furnished with cross-ties ten miles shall be completed, ironed, and equipped and in operation.

Sec. 5. That the State of Florida hereby grants to said company, in consideration of the greatly improved value which will accrue to the State from the construction of said road, its branches, and extensions, ten thousand acres for each mile of road it may construct of the lands granted to the State under said act of September 28, 1850, said lands to be of those which may be nearest the line of said road, its branches, and extensions; Provided, however, That the grant of lands made by this section is made subject to the rights of all creditors of the Internal Improvement Fund and to the trusts to which said Fund is applicable and subject under the act entitled "An act to provide for and encourage a liberal system of internal improvements in this State," approved January 6, 1855, and subject to control, management, and sale and application of said Fund and the lands constituting the same by the Trustees of the Internal Improvement Fund for the purposes of said trust under said act; Provided, however, That the title to the lands granted under this section is not to vest until they shall be released from the indebtedness existing against said trust fund, it being the purpose of this section to grant the residuary interest of the State in the lands granted by said act of September 28, 1850, after satisfaction has been made of said indebtedness to the extent or in the quantity indicated hereby to aid said railroad company; Provided further, however, That upon any arrangement being consummated between said company and the trustees of the Internal Improvement Fund and the creditors of such Fund for the release of such lands from such indebtedness, then the title to such lands as may be so released shall vest in the said company in the proportion of ten thousand acres for each mile of railroad then graded and furnished with cross-ties, or that may thereafter be graded and furnished with cross-ties; Provided, That for every forty miles of road so graded and furnished with cross-ties ten miles shall be fully completed and equipped and in actual operation; Provided further, That all the lands granted by this act or their proceeds shall be applied to the construction, equipment, and operation, of said railroads.

The other facts are stated in the opinion.

Thrasher & Hampton for J. B. Brown.

Taylor & Sanchez for Florida Southern Ry. Co.

WESTCOTT, J.—In this case an injunction granted in the Circuit

Court upon bill and exhibits was subsequently dissolved, and from this order, and an order refusing to reinstate the injunction, Brown appeals to this court. There was a demurrer to the bill by the company, which being overruled the company appeals. This opinion covers both appeals. The bill concerns two subjects: the capital stock of the company, in which Brown was an incorporator, and a grant of land made by the State to the company. The allegations as to each subject are not, as they should be, placed together in the bill, but we find allegations as to the stock followed by statements as to the land, and then statements as to stock. Thus framing a pleading serves no other purpose than to embarrass those whose duty it is to examine and analyze it.

We first discuss the case as to the stock. As to the stock, the plaintiff sets up in his bill, original and as amended, and in exhibits a part of the bill, that the plaintiff, Brown, N. R. Gruelle, B. F. Matthias, H. C. Howard, G. B. Phinney, James Hunter, George H. Packwood and Thomas C Lanier, on the 10th of May, A.D. 1876, signed articles of association as incorporators of the Gainesville, Ocala and Charlotte Harbor R. R. Co.; that the name of the company was subsequently changed to the Florida Southern Ry. Co., and that the capital stock of the company was fixed at \$3,250,000; that the above-named parties subscribed for shares "one thousand dollars" each, and were declared directors. On the 6th of May, 1879, we find from an exhibit showing a meeting of the directors that Brown, Phinney, Whitney, Matthias and Gruelle were five of them, and that Brown was Vice-President of the company.

Plaintiff alleges that in May, 1879, "stock was voted by the corporation five hundred shares each to the following corporators: H. C. Howard, G. B. Phinney, B. F. Matthias, H. C. Whitney, N. R. Gruelle and J. B. Brown, each 500 shares now valued at \$50,000;" that in December, A.D. 1879, the company and himself agreed to give ten parties of Boston, Massachusetts, viz.: Charles Francis, A. H. Bachellor, Edward Avery, Charles Whitney, D. N. Skillinger, G. B. Nichols, W. R. Duper, J. R. Hall, John M. Candler and A. D. S. Ball, each \$150,000 worth of stock, and that seven of their number might be elected directors "if they would raise money enough to build the road," and that this arrangement was agreed to and carried out; "that in August, 1880, these ten parties from Boston, together with H. C. Whitney" (who held, as before stated, five hundred shares of stock valued at \$50,000), "divided the balance of stock unappropriated by said company to wit, stock to the amount of \$2,856,000, in the following manner: \$150,000 each to the ten Boston parties before named, making \$1,500,000, and three hundred and thirty-nine thousand dollars to each of the following named parties: H. C. Whitney, C. A. Boardman, Isaac Taylor and W. L. Candler, making \$1,356,000, which

plaintiff alleges "consumed all of the unappropriated stock of said company."

Plaintiff alleges that he never consented to "this distribution of stock" to these four parties; that this distribution was made at a meeting of the ten Boston parties and Whitney; that he was represented at that meeting by Charles Francis, who was authorized to act for him in the distribution of stock with special instructions that plaintiff would not agree to any arrangements made with Boardman, Taylor and Candler, and that the said Francis was only to represent him in the fair and just distribution of the stock of the said corporation among those entitled to receive stock, and affirms that by virtue of his relation as an original incorporator he was entitled to \$113,000 worth of stock (in addition to the \$50,000 he had already received), which is one twelfth of the amount left of the two million eight hundred and fifty-six thousand dollars' worth of unappropriated stock after deducting the one million five hundred thousand dollars awarded to the ten parties in Boston. Plaintiff alleges that he claims this because there were twelve incorporators outside of the ten parties from Boston, and avers that even if Boardman, Taylor and Candler are proper and legitimate corporators, they and H. C. Whitney are not in any way entitled to the large amount of stock received by them, while he, one of the original incorporators, was entirely excluded; and that should they be entitled to a fair distribution of stock plaintiff would then be entitled to the sum of \$90,400 worth of stock, which is the one fifteenth of \$2,856,000 less \$1,500,000 for the ten Boston parties. Plaintiff alleges that the failure to allot him his just share of stock was a fraud, and that the principal actors agreed at one time to adjust the stock, but now refuse.

Plaintiff alleges that all of the incorporators were not present at this meeting, personally or by proxy. Plaintiff, in his amendment to the original bill, alleges that, in the latter part of the year 1879, H. C. Whitney made a contract of sale of all of the franchises of the Gainesville, Ocala and Charlotte Harbor R. R. Co. to C. A. Boardman, Isaac Taylor, and himself, and that they afterwards admitted W. L. Candler, each of the parties paying therefor the sum of one thousand dollars; that this was done without the knowledge of plaintiff, and that in 1880, when he became aware of it, he notified Francis and Boardman that Whitney had no right to make any such disposition of the franchises of the company; that notwithstanding such notice, after obtaining the power of attorney to distribute stock, the said parties endeavored to enforce said fraudulent sale, and they continued to recognize and enforce the same to the injury of the plaintiff and the other incorporators. Plaintiff alleges that prior to the holding of the meeting of August, 1880, said Whitney sent to him a power of attorney to sign, which was as follows: "Know all men by these presents, that we, James

B. Brown and N. R. Gruelle, of Gainesville, Florida, hereby constitute and appoint Henry C. Whitney to be true and lawful attorney for us, and in our names and stead to appear at any directors' meeting of the Gainesville, Ocala and Charlotte Harbor R. R. Co., at any time or at any other meeting, or at any time hereafter, or in any place, and either verbally or by writing, under seal or not, and in our names, places, and stead, as fully as we might or could do if personally present doing the same; to agree and consent to any allotment, division, or vesting of title and ownership of, in and to the capital stock of the Gainesville, Ocala and Charlotte Harbor R. R. Co. to or in any person or persons, and by any method, and to receive any such stock for us, and to receipt in any mode therefor irrevocably, with full power of substitution, hereby granting unto our said attorney full power and authority to act in and concerning the premises as fully and effectually as we might do if personally present, ratifying and confirming all that our said attorney may lawfully do or cause to be done by virtue of this power hereby granted or intended to be. In witness," etc., etc. The power is dated in August, 1880; that he refused to sign said power of attorney; that soon thereafter Charles Francis telegraphed plaintiff from Boston asking him if he had signed and forwarded the power, and Boardman wrote to him asking him the same question.

Upon these facts and the acts of the parties in distributing the stock the plaintiff charges fraud and combination against him. Plaintiff alleges that he appointed Francis to act for him at said meeting at the instance and request of Boardman, who represented that Francis was a very correct man and would protect plaintiff's interest, and that he empowered said Francis by power of attorney to act for him "only in the division of stock." Upon these facts plaintiff, as against Whitney, Boardman, Francis, and Candler, charges fraudulent combination to deprive him of his rights. Plaintiff in his amended bill alleges that the four parties named pretended at said meeting to represent most of the incorporators and the corporation, and that they appropriated to themselves the entire amount of the remaining capital stock of the company without paying any consideration therefor or doing any act that was of any benefit to said corporation.

Then follows a charge that all the other parties present at the meeting participated in the fraud of these parties with full knowledge that said Francis was empowered and authorized only to "allot" the unappropriated stock fairly and justly among those entitled thereto. Plaintiff in his amended bill prays that Boardman, Taylor, Candler, and Whitney be made parties defendant, and that they may be enjoined from encumbering or disposing of the stock held or claimed to be held by them. In his original bill he prayed that the officers of the company and the company be

enjoined from allowing any transfer of the stock of the company or of the individual members thereof; that the company be decreed to convey to plaintiff absolutely and unconditionally, and free from all encumbrances, \$113,000 worth of stock.

Reading this bill carefully it will be perceived that the appellant, Brown, bases his whole claim to the relief he asks upon the ground that at the meeting of the company in 1880, at which he had a representative, the acts of the company and its officers then present were in violation of his rights as an original incorporator. These acts all culminated in what he calls distribution of stock. The charter fixes his right as an incorporator, prescribes the method of the organization of the company, and regulates the matter of the capital stock both as to its amount and as to subscriptions thereto after the organization of the corporation. As an original incorporator he signs his name to the articles of association, stating the "number of shares of stock he agrees to take" in the company, and upon filing the articles, affidavits and other matters required to be filed in the office of the Secretary of State, and the issuing the certificate by the Governor, the law provides that "the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified by such articles of association, and shall possess the powers and privileges granted to corporations and be subject to the provisions contained in this act."

The language "the persons who have so subscribed such articles of association and all persons who shall become stockholders in such company" shows that others in addition to those signing the articles and agreeing in the articles to take stock may become stockholders, and the law provides how they may become stockholders. The statute provides that when the articles, affidavits, etc., are filed and recorded in the office of the Secretary of State, "the directors may, in case the whole of the stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places, and after giving such notice as they may deem expedient, and may from time to time receive subscriptions until the whole capital stock is subscribed." It is thus seen that after the organization of the corporation the matter of subscriptions to stock is under the control of the directors in the respects indicated, that as to this matter the right of an incorporator is merged into that of a stockholder, and that a stockholder has no authority to control the matter of subscriptions to stock as against the company, but that the directors "may receive subscriptions" therefor. At the meeting of the directors in Boston the fact that plaintiff had signed the articles of association of the company gave him no right to demand at such meeting, either in person or by his representative, Francis, a conveyance to him by the company absolutely and

unconditionally, and free from all encumbrances, \$113,000 worth of stock, nor does the fact that he was an original incorporator give him the right to enjoin the company from permitting any transfers of stock. The plaintiff not only bases his bill upon an erroneous idea as to his rights as an original incorporator, but it is apparent that he misconceives entirely the relations of the stockholders to the company and to each other. Subscription to the stock of a corporation is a contract between the stockholder and the company by which the person taking stock acquires an interest in the property and franchises of a corporation in the proportion the stock subscribed by him bears to the aggregate amount subscribed by others, and this interest is controlled by the charter which creates the corporation. Having subscribed for stock, the party becomes subject to that section of the law which provides that "the directors may require the subscribers to the capital stock of the company," not the signers of the articles, "to pay the amount by them variously subscribed in such manner and in such instalments as they may deem proper," and the stockholder contracts so to do. The plaintiff by limiting the authority of his agent and representative, Francis, "to act in his name ONLY in the division of stock" (the small capitals are the plaintiff's), did not authorize him to subscribe for stock or to make any contract with the company similar to that of a subscription to stock. His authority and agency was to receive a grant of stock absolutely and unconditionally, which plaintiff claims by virtue of the fact that he was one of the signers of the articles of incorporation. While the plaintiff admits knowledge of the time and place of the meeting, and has an agent there, it was not within the power of the company to do what this agent was authorized to demand or receive, as it was and is beyond the power of the company to make a donation of stock not subject to calls to either an incorporator or stockholder, or any one else. We do not mean to say whether the company might or might not pay for services to the company in stock. The question is not here raised.

The plaintiff makes no case of an application by him to the company to subscribe for stock, and for that reason, even if it was the duty of the company to receive such application and to grant it, he has not placed himself in a position where he can ask the aid of a court of equity to direct the company or its directors to issue stock to him. For all that appears in this bill he may not be willing to enter into a contract to pay instalments upon the call of the directors which is involved in a stock subscription.

As to the stock claimed to be held by Whitney, Boardman, Taylor and Candler. There are no facts alleged here which negative the view that the directors at the meeting in Boston, at which plaintiff had an agent, did not receive subscriptions for stock to the amount of \$339,000 from each of them, and if this be the

fact we know of no cause of action which the plaintiff has against the company for such act. The plaintiff made no application for stock, and the directors, so far as the facts are stated in this bill, exercised a power plainly granted to them by the law which defined their powers and duties. The complaint is that these parties received stock "without paying any consideration therefor or doing any act that was of any benefit to said corporation." Under the charter and under the general law of corporations it is not necessary that the payment of any money or the doing of any act beneficial to the corporation shall precede a subscription to stock. We have already explained the nature and method of such subscription so far as it is necessary to define it in this case. It is unnecessary to repeat. As to the allegation that plaintiff was defrauded of his rights by the parties present at this meeting—the right which he claims had no existence, and he could not therefore be defrauded of it.

As to the allegation in the amended bill that in the latter part of the year 1879 Whitney made a sale of all the franchises of the Gainesville, Ocala and Charlotte Harbor R. R. Co. there is nothing to show that the company recognized such sale, or that it even knew anything of the matter; on the contrary, plaintiff in his bill admits the fact that the company has constructed a portion of its road and is in the active exercise of the franchise to be a corporation and to operate the road as a common carrier, and one of the grounds of complaint is that the company is about to receive a grant of land from the State.

Our conclusion, so far as the matter of the stock of the company is concerned, is that there is no equity in the bill, and that the plaintiff shows no right, as against the company, to any more than five hundred shares of stock; and as to that, he is under obligation to pay calls when made by the directors.

As to the land—

The allegation as to the stock he holds and his relation as an original signer of the articles of association, need not here be repeated. They go, however, as a matter of course, to make up the case as to land.

Plaintiff alleges that on the 4th of March, A.D. 1879, an act was passed by the Senate and Assembly of the State of Florida granting to the corporation the alternate sections of land on each side of the proposed line of road "and ten thousand acres per mile in addition, and that it was provided in said act that said corporation should not be entitled to any of the benefits of this act or any rights thereunder until J. E. Lipscomb, B. F. Matthias, H. C. Whitney, G. B. Phinney, J. B. Brown, J. E. Young and T. C. Lanier, N. R. Gruelle, J. W. Hendry, D. Hughes and F. A. Hendry, or such of them as are not already corporators in said company, shall become such;" that upon the completion of the

grading and laying on the cross-ties of ten miles of said road, its branches or extensions, the title to said alternate sections opposite said ten miles of road so graded and furnished with cross-ties shall vest in said company, and a deed therefor shall be issued by the trustees of the Internal Improvement Fund to the said company; that the company claims to have furnished twenty miles of said road from Palatka towards the town of Gainesville, and have demanded that the State Surveyor inspect the same, and the Board of Internal Improvement has ordered an inspection by said Surveyor, and the Board say that if the completion of the twenty miles towards Gainesville comes up to the requirements of the law they will deed the land to the company, as provided by the act, immediately upon a favorable report being filed by the Surveyor; that the Surveyor was sent by the Board to inspect said road two weeks ago, and he says that he will finish the examination and report within two weeks; that the completion of the twenty miles from Palatka is in compliance with the law so far as his information and observation extend, and that plaintiff is firmly of the opinion that the Surveyor will report such to be the case within the next day or two, if he has not already done so; and that the Board of Internal Improvement Fund of the State will make deeds to the company to the lands as provided by law, and the members of said Board openly proclaim that they will do so; that this twenty miles is all that has been finished of said road, and that the said company started work at Palatka end of Palatka branch of said road, and that the whole line of said road is estimated by said company to be two hundred and ninety-three miles long; that the land grant from the State is a large and valuable one, and would never have been obtained from the Senate and Assembly of the State of Florida but for the persistent and untiring efforts of your orator; that in a few days, by agreement between the corporation and the Board of Internal Improvement of the State of Florida, deeds will be made to said company to all the lands they are entitled to upon completion of twenty miles of said road, which is a very large quantity; and that plaintiff is entitled to his share of said land, and he fears and believes that when the company get deeds to this land they will at once hypothecate the said lands or transfer or dispose of the same in some way into the hands of strangers, and thus deprive complainant of his just rights in the premises; "that he is entitled to his share of said land as an original incorporator of said company; that the State made him a corporator; that he accepted the same, and he has never resigned or transferred his right thereto; that he is entitled to a share in the land in the proportion of \$163,000 of capital stock, his share is, to the total capital stock of said company \$3,250,000. Plaintiff prays that the corporation be enjoined from mortgaging or encumbering the lands which may be deeded to them in pursuance

of the land grant enactment, and that the company may be decreed to hold and preserve the land exactly and precisely as it may be deeded to them without change, transfer or hypothecation. We discover no prayer that the company or the trustees be decreed to make a title to plaintiff of the land; the prayer is only to restrain the company from doing anything with it. These are the facts with reference to which the demurrer is to be considered, except that the statement that the act granting the land did not provide absolutely that the corporation should not be entitled to the land unless Lipscomb and the others named should become corporators. That clause of the act was followed by a promise to the effect that if any of such persons should die or refuse to become a corporator the fact of such death or refusal should not prevent any rights from vesting under the act.

The company under its charter is authorized to make contracts, and if they see proper to make this land the basis of credit by executing a mortgage upon it, the company has such right. The grant here made is to the company, and it has authority to receive the land. Brown as an incorporator is not entitled to the proportion of the lands claimed. The grant is to the company, not to him.

A grant of land to a corporation with power to make contracts in reference thereto for the purpose of accomplishing corporate purposes is not a grant to the original corporators in the proportion in which they have subscribed for stock in the company organized. The title vests in the company for the purpose of accomplishing the end and object of its creation, and not in the individual stockholder in the proportion that his shares bear to the whole stock for his private benefit and disposal.

To the extent that the corporation here would be enjoined from receiving this land as a means of promoting the construction of the railway and controlling it in its stock interests, to that extent would it be equivalent to a judgment of forfeiture of its rights upon a quo warranto.

So far as the land grant is concerned we, therefore, see that there is no equity in the bill.

In the case of the appeal in *Brown v. The Florida Southern Ry. Co.* and others, the orders of the circuit court appealed from are affirmed.

In the case of the appeal of *The Florida Southern Ry. Co. and Others v. Brown*, the order overruling the demurrer is reversed and the case will be remanded, with directions to enter an order sustaining the demurrer and dismissing the bill.

At the January term, 1882, at which the above case was submitted, a motion was also made by Brown for the appointment of a receiver to take charge of the railroad and other properties of the company during the pending of the suit.

474 LAMOILLE VALLEY R. R. V. B. AND M. AND ST. J. R. R.

WESTCOTT, J.—In this case the court having determined that there was no equity in the bill, as a matter of course it cannot be made the foundation of a motion for receiver and injunction.

The motion is denied.

LAMOILLE VALLEY R. R. Co. AND ESSEX COUNTY R. R. Co.

v.

BIXBY AND MONTPELIER AND ST. JOHNSBURY R. R. Co.

(55 Vermont Reports, 235.)

The defendant railroad and the orators under a partnership arrangement were operating the three lines of road. Defendant B. obtained a judgment against the defendant railroad for injuries received through its neglect, not knowing of the partnership. He levied his execution on an engine, tender, and baggage car, owned by the three companies, and the same were sold to his agent, L.; and he had also levied upon another engine owned by the same companies, and had advertised it for sale, when he was enjoined. A bill having been brought, setting up the superior rights of partnership creditors, *held*, although the rights of partnership creditors, as a rule in equity, are superior to those of the individual creditors, yet the court will not enjoin, where equities are equal; or, where, in this case, it does not clearly appear by allegation or proof, that the partnership indebtedness existed at the time the property was seized on execution; or, especially, under the special provisions of our statute. R. L. s. 3443, whereby a passenger, injured through the negligence of a railroad company, has a right in attaching cars, engines, etc., superior to the general equity of the partners.

It is decreed that the orator in the cross-bill, defendant B., obtained a valid lien on one third of the engine levied on; but no decree could be made as to the property sold to L., unless he were made a party; and the validity of that sale would seem wholly a matter of law.

The priority of right or partnership creditors exists only in equity, not in law.

BILL in Chancery. Heard on bill, answer, and testimony, December term, 1877, Ross, Chancellor, Caledonia County. Decree pro forma for the orators. The bill alleged as to the partnership indebtedness:

“Your orators further show that prior to the building of either of said roads, to wit.: on the day of a joint or partnership arrangement was entered into by the said three corporations to build and equip and run their several roads under one management, and to raise money for that purpose upon their joint credit, and by joint mortgages of their several roads and property, and each of said companies was to pay its proportion of the moneys so raised, as should be expended upon its road, and said several

roads were built, and have been run under said arrangement, and the same is still in full force between the said companies.

And your orators show, that of the moneys so raised upon the joint credit of said companies, and by mortgage of the several roads of each of said companies, a much larger proportion was expended upon the Montpelier and St. Johnsbury Co.'s road, than either of the others, so that upon a fair adjustment of the accounts between the companies, the said Montpelier and St. Johnsbury Co., for the moneys so raised and expended there would be due to the orator companies from the said Montpelier and St. Johnsbury a large sum of money, as your orators believe of more than fifty thousand dollars.

And your orators further show, that in the purchase of equipments, furniture, and supplies for the use and operation of said roads under said joint or partnership management, and for expenses of operating the same, a large amount of joint or partnership debts have been created, and are now outstanding, largely exceeding in amount the value of all the personal estate and property of every kind held by said companies, and the several roads of the said three companies are so heavily encumbered by mortgages as not to be available for that purpose provided they were liable therefor. And your orators insist that both in law and equity all the joint personal property and assets of the said road acquired under their joint or partnership arrangement are liable and held for the payment of said joint or partnership debts before it can be reached or applied to the payment of a liability of either of said companies alone, and that not only the joint or partnership creditors have a right to have the joint property so applied, but that each party to such joint or partnership arrangement has an equitable right to have such application made and to object to and resist the division of any of such joint or partnership property to the payment of the several debts of either of said companies." . . .

"And your orators further allege that all the rolling stock, equipment, furniture, and personal property of all kinds upon the said roads, does not exceed in value sixty thousand dollars, and that the said three companies jointly owe debts incurred for service rendered, and material furnished for the purpose of keeping the same in repair and running the same, to an amount very largely exceeding the value of all the rolling stock, furniture, equipment, and personal property on said roads, and they believe to the amount of three hundred thousand dollars, and that they have no other property, or means of paying the same, and that each of said creditors has at least as much a lien, and as much equitable claim to payment of his debt out of such property, as said defendant, and that if defendant has any right whatever, it is only for his pro rata share therein upon a proper marshaling of all such assets."

The defendant Bixby had sold in part satisfaction of his execution the engine "Swanton," tender and passenger car attached, to J. P. Lamson. The prayer of the cross-bill was:

"And your orator prays that the title to the said engine and tender called the 'Swanton' and passenger car attached, may be settled and the title confirmed to your orator, that your orator's judgment against the Montpelier and St. Johnsbury R. R. Co. may be decreed a first lien upon the rolling stock owned by the said three corporations, and that said lien be enforced by a sale of said rolling stock or so much thereof as may be necessary for the payment of said judgment, and in case this honorable court shall decide that your orator was only entitled to have one undivided third part of said rolling stock sold on said execution, then your orator prays that in default of the payment of said judgment, that said third part may be designated and set apart and sold, or enough thereof sold to satisfy said judgment," and for further relief.

S. C. Shurtleff and J. P. Lamson for the defendants.

The other partners cannot maintain this bill, as they are insolvent, as shown by the proof, and there is no assurance that they would apply it to pay the other partnership debts. The bill does not allege, and the proof does not show, that at the time of the attachment of the engine and car in controversy that the concern was insolvent. The bill must fail for this cause. *Willis, Admr. v. Freeman*, 35 Vt. 44; *Russ, Admr. v. Fay*, 29 Vt. 381.

The defendant, Bixby, had the right at law to attach this property. *Reed & Root v. Shepardson*, 2 Vt. 120; *Bardwell v. Perry*, 19 Vt. 292. But on the merits the orators must fail. The bill does not allege, nor does the evidence show, but that every dollar of the joint or partnership indebtedness now outstanding has been contracted since the attachment of this property by the defendant, Bixby. It is for the orators to show it was outstanding at that time, and not for the defendant to show it was not.

The statute, c. 28, s. 65 (Gen. St.) gave the defendant power to attach.

Poland for the orators.

The property levied upon by the defendant, Bixby, was partnership property, bought and paid for by partnership funds. It is conceded that the partnership debts exceeded the value of all the property or assets.

In such case the law is perfectly settled that a creditor of one member of the firm cannot levy upon any specific portion of the partnership property and apply it to the payment of his debt. If he would reach the parties' interest in the partnership for the satisfaction of his private debt, he must take his interest in the whole after the partnership debts are all paid. The partnership property must first be applied to pay the partnership debts, and there is no interest that an individual partner or his creditor can take till this

has been done. *Parsons Partnership*, c. 10; *Washburn v. Bellows Falls Bank*, 19 Vt. 278.

The defendant seeks to avoid the effect of these plain and obvious principles in several ways. He says his claim was one for which the partnership was liable, and he might have sued and obtained judgment against all. If this were so, it does not seem clear how it can help the defendant.

Can the property of A. be taken and sold on an execution against B., because A. was holden for the same debt, and might have been sued jointly with B.?

But the cross-bill is founded on an entirely new and different claim from the original bill, and there is no connection between the two; and it is clearly no case for a cross-bill, which is only one mode of defence. *Slason v. Wright*, 14 Vt. 208; *Rutland v. Page*, 24 Vt. 481.

REDFIELD, J.—This bill is founded upon the claim of the superior rights of the creditors of a partnership in its property to the individual creditors of one member of the firm.

The bill alleges that the line of railroads now known as the "St. Johnsbury & Lake Champlain R. R.," consisted of three corporations, viz., the two made orators in this bill, and the Montpelier & St. Johnsbury R. R. Co.; that while operated by the three roads jointly under a written contract, the defendant Bixby recovered judgment for a personal injury against the latter railroad company while a passenger on the line of its road, occasioned by want of care in operating said railroad; and has levied an execution founded on such judgment upon a locomotive, tender and baggage car which was the property of the three railroad companies. Bixby was enjoined and restrained from selling the property by the chancellor.

The defendant Bixby answers, and brings a cross-bill denying the equity of the orators, and claiming a superior right under his levy. Further details in the pleadings or proof do not seem important in the determination of the case.

It is settled law that the partnership creditors have in equity a superior right to the property of the firm, to insure the payment of its debts over the attaching creditor of one member of the partnership. And this is based upon the supposed lien which the partners have among themselves upon the assets of the firm. But the embarrassment in this case arises upon the application of these principles to the case in hand.

The principle invoked obtains only in equity, and at law the defendant Bixby might attach and sell one third the property in question, without regard to the equities of others. *Bardwell v. Perry*, 19 Vt. 292; *Reed v. Shepardson*, 2 Vt. 120.

It does not clearly appear by allegation or proof that the

partnership indebtedness existed at the time the property was seized on execution; if not, the bill is without foundation. *Bardwell v. Perry*, supra. In *Brewster v. Hammet*, 4 Conn. 540, where it was shown that the partnership had become insolvent, and its property by foreclosure or otherwise had gone out of its hands, the court refused such application on the ground that it felt no assurance that the partnership creditor would be benefited. These corporations have undergone many changes and transformations. The joint mortgages upon their railways and property have been foreclosed, and titles to the same have passed to others under decrees of the court; and now the whole line of these railroads is operated under a different name; and how far the claims of creditors have been satisfied by their decrees of court, is not known. In this condition of the property there would seem no equitable ground for interfering with the legal rights of Bixby under his levy. Yet we should hesitate to dispose of this case upon these grounds without a more careful examination of the evidence and authority.

But the statute of 1855, which is section 3443 of the R. L. of this State, declares that "when the property or person of another is injured through the default of a railroad corporation, its agents or employees, the cars, engines, and other property, which at the time of such injury are subject to use in the running and management of such road, and which at any time have been owned by said corporation, shall be held to be the property of such corporation for the purpose of furnishing indemnity for such injury; and may be attached and levied upon as such at the suit of the party injured." The defendant Bixby obtained judgment against the Montpelier and St. Johnsbury R. R. Co. for a personal injury suffered while a passenger on said road, through the alleged default of said corporation. The alleged default of the corporation and the damages occasioned by the injury to Bixby, are conclusively established by the judgment. It is now proved that all the engines and cars were owned and the trains run by the three corporations, under a written contract between them, but this was unknown to Bixby until after he obtained his judgment. He found the franchise granted to this corporation being used in a train of cars on a track in the line of its road. He had a right to presume that all this was done by it in the exercise of its lawful franchise. And every participator in the act of running the train of cars is presumed to have knowledge of the law. It is not important, as we think, whether each corporation runs the train over its own section of the line, or, whether by mutual contract they jointly run the whole line; the property attached to the extent of defendant corporations' ownership, is by the statute made subject to attachment to respond and "indemnify" the passenger for the injury suffered. And such passenger has, by this statute, a special

right in his attachment of the engine and car superior to the general equity of the partners in the partnership property. If the equities were equal, the defendant having attached the property should be permitted to pursue it. *Bardwell v. Perry*, supra; *Ex-parte Ruffin*, 6 Ves.

As to the cross-bill. The sale of the engine "Swanton," tender and passenger car attached, which were bid in and purchased by Lamson, is a matter entirely foreign to the subject-matter of the original bill. Lamson, though he acted in the purchase as agent for Bixby, was vested with the legal title and no decree could be made affecting that property unless he were made party; besides, the validity of that sale would seem wholly a matter of law. The introduction into a cross-bill of a distinct and independent subject of controversy, and not within the scope of the original bill, is incongruous and not allowable. This is not strictly a cross-bill, but a bill in the nature of a cross-bill introducing additional parties; and the defendant Bixby seeks not only to defend against the orator's bill but to obtain affirmative relief.

The defendant levied his execution upon the property; the orator by his bill seeks to release the property from the defendant's lien created by the levy, and has enjoined proceedings to perfect and enforce it. By the mutations of title incident to foreclosure, receivership and decrees of court, intervening claims to the property levied upon are now supposed to subsist; and we think the rights and interests of the parties, as we find them, so far as practicable, should be made effectual.

It is therefore ordered and decreed that the orator in the cross-bill, Bixby, obtained by his levy of the execution, in his favor against the Montpelier & St. Johnsbury R. R. Co., a valid lien upon one third of the engine called "Hyde Park," tender and baggage car attached thereto; and such lien is declared to continue and subsist. The decree of the court below is reversed and cause remanded, with directions to enter a decree for the orator in the cross-bill, Bixby, for the amount of the execution levied upon such property with interest; and if the parties do not agree, the matter will be committed to a master to report the value of such property levied upon at the time of the injunction in this cause, viz.: the 16th of October, 1877; and the amount of one third of such valuation with interest therein from the latter date to the present time, which sum to be paid to the clerk of Caledonia county court for the benefit of said Bixby within sixty days from the final decree in this cause, and in default, execution shall issue on this decree, and the property so levied upon sold by the sheriff of said county to satisfy said one third valuation of said property with interest and the costs of sale. And the orators in the cross-bill are to recover their costs.

Decree reversed and cause remanded with a mandate.

BURLINGTON AND MISSOURI RIVER R. R.

v.

THOMPSON.

(Advance Case, Kansas. January 8, 1884.)

The laws of a State, and in this are included its exemption laws, have no extra territorial force.

To garnishee proceedings in the courts of this State, it is no sufficient answer that the debt of the garnishee to the defendant is by the laws of the State where both defendant and garnishee reside exempt from seizure under such process.

A foreign railroad corporation coming into this State, and leasing and operating a line of railroad here may be garnisheed for a debt due to one of its employees, although such employee is not a resident of this State, and although the debt was contracted outside of the State.

Where at the time of service of garnishee process, the defendant is in the employ of the garnishee and continues thereafter in such employment, the garnishee proceedings bind only the amount due at the date of the service of process and do not reach to amounts subsequently earned, even under a prior contract of employment.

W. W. Guthrie for plaintiff in error.

Hudson & Tufts for defendant in error.

BREWER, J.—The facts in this case are as follows: Plaintiff in error is a corporation created under the laws of the State of Nebraska, and having its principal office in the city of Omaha in that State. It has leased and is operating a line of railroad running from Lincoln, Nebraska, to Atchison, Kansas, some thirty-seven miles of which are within the limits of this State. In the operation of this road, it employs a station-agent at the city of Atchison. One Jackson was, in the month of November, 1881, a brakeman in the employ of said corporation and employed on its trains running from Lincoln to Atchison. He was a married man, residing with his wife at Lincoln, Nebraska. On November 9, 1881, defendant in error commenced an action before a justice of the peace in the city of Atchison against said Jackson, and caused garnishee process to be served on plaintiff in error. At that time plaintiff in error was indebted to said Jackson for wages, already earned during the month of November, in the sum of \$13.50. He continued in its employ until the nineteen of the month, when the wages for the month then due him, \$26.25, were paid to him by the corporation. It also appears that by the laws of Nebraska the wages for laborers for sixty days are exempt from

seizure on legal process. So that we have these facts upon which to determine the rights of the parties. The employer is a corporation created by and existing under the laws of Nebraska, with its principal office and centre of business in that State. Its employee, engaged in manual labor, also resides in that State. By the laws of Nebraska, where both employer and employee reside, his wages are exempt. The employer leases property and transacts business in this State. A creditor of the employee comes into the courts of this State and garnishees the employer for wages due the employee, claiming that though such wages are exempt under the laws of the State of Nebraska, they are not under the laws of the State of Kansas. Can such an action be maintained? We think these propositions are sound. The laws of a State have no extra-territorial force. This as a general proposition is unquestioned and includes within its scope exemption as well as other laws. So, although the laws of Nebraska where employer and employee reside, exempt laborer's wages absolutely, it does not follow that the courts of another State, will, in controversies pending before them, enforce the same exemption. On the contrary the matter of exemption being one affecting the remedy at least within certain limitations, is one controlled by the *lex fori* and not by the *lex loci contractus*. Therefore, although both creditor and debtor reside within the limits of the State, the exemption laws of that State do not control garnishee proceedings in another. *Helpenstein v. Cave*, 3 Iowa, 287; *Newell v. Hayden*, 8 Iowa, 140; *Moore v. C., R. I. & P. R. R. Co.*, 43 Iowa, 385, 388; *Conley v. Chilcote*, 25 Oh. St. 325; *B. & O. R. R. Co. v. May*, 25 Oh. St. 347; *Pierce v. C. & N. W. Ry. Co.*, 36 Wis. 283; *Morgan v. Neville*, 74 Pa. St. 52; *Lock v. Johnson*, 36 Me. 464; *C. & A. R. R. Co. v. Ragland*, 84 Ill. 375.

It may be conceded that in the courts of a State any citizen of that State may be enjoined from resorting to the courts of any other State for the purpose of evading the exemption laws of his own State. *Snook v. Snetzer*, 25 Oh. St. 516. But no such doctrine or implication therefrom applies in the case at bar, for while the debtor and the garnishee were citizens of Nebraska, the residence of the plaintiff, the creditor is not disclosed. It does not appear that he was a citizen of Nebraska seeking through proceedings in a court of a sister State to avoid the exemption laws of his own. For aught that appears he is a citizen of Kansas, appealing only to the laws and the courts of this State for the collection of his debt, and simply denying that the laws of another State shall prevent the collection of his debt according to the laws and procedure of his own State.

Again, no question arises here as to the effect of a judgment against the garnishee in the courts of this State as against proceedings to collect the debt in the State of Nebraska where the debt

was created. As to that question, the cases of *Pierce v. Railroad Co.*, 36 Wis. 283, and *Moore v. Railroad Co.*, 43 Ia. 385, seem to be divergent. As to which states the law correctly we need not now inquire. The question in this case is not what is the effect of a judgment against a garnishee, but what ought to be such judgment. Of course no debtor should be required to pay his debt twice, but at the same time if he goes into a State outside the State of his residence and transacts business therein, he must expect as to all matters of procedure and remedy to abide by the laws of that State. He may not claim the privileges and the protection of the laws of the State into which he enters and transacts business without submitting to the burdens and obligations of such laws. Coming into this State to transact business he must abide by the exemption laws of this State, and when a party who for aught that appears, is a citizen of this State, invokes the process of our courts and the rules of our statutes to secure the payment of a just debt, a garnishee may not reply that by the laws of the State where he resides and where his employee also resides, his debt to such employee is exempt from all garnishee process. It cannot be doubted that the courts of the State where he resides will respect a judgment rendered against him in this State, provided he has made a perfect and full disclosure and a reasonable defence against the claim presented, and the case from 36th Wis. 283 (*supra*), contains nothing contradicting this proposition. We think, therefore, that it may be laid down as a legitimate conclusion from the authorities that as the laws of a State have no extra-territorial force, and as the plaintiff in this action does not appear to have been a resident of Nebraska or under any obligation, legal or moral, to respect the laws of that State, that his proceedings to compel the payment of a just debt from the defendant as garnishee cannot be defeated by the fact that the laws of the State where both debtor and garnishee reside exempt the debt from seizure under such process.

Again, so far as any question arises under the laws of this State defining exemption liability it is enough to say that while the testimony disclosed is not perfectly satisfactory it does not appear that all the testimony bearing upon that question is preserved in the record. Hence, we cannot affirm that there was any error in the ruling of the trial court in this respect. As to the liability of defendant to garnishee proceedings like this it must be sustained. Whatever doubts may have existed in some States, it seems to us clear that a corporation or individual coming into this State, leasing property and transacting business here, becomes liable to garnishee proceedings. A mere debt is transitory, and may be enforced wherever the debtor or his property can be found, and if the creditor can enforce the collection of his debt in the courts of this State, a creditor of such creditor should have equal facilities. *Braser v. Ms. Co.*, 21 Wis. 506; *Fithian v. Railroad Co.*, 31 Pa. St. 114; *Bank*

v. Railroad Co., 45 Wis. 172; *Hannibal & St. Joe R. R. Co. v. Crane* (Supreme Court of Illinois), 16 Western Jurist, 360.

For a further discussion of the questions in this case, we refer with approval to the two carefully prepared opinions of the learned judge who tried this case in the district court, and which are presented in the brief of counsel for defendant in error. We cannot add to the arguments so clearly and ably stated therein by Judge Martin.

A cross petition in error has been presented. So far as the attempt to attach a new case made or further portions of the record is concerned it is unauthorized, and all such matter must be stricken out. Upon the case made itself counsel present this question. At the time of service of garnishee process the railroad company was indebted to Jackson in the amount for which it was adjudged liable. He continued in the company's employ till the latter part of the month under the same contract of employment. Now, did the garnishee process bind only the amount earned by defendant and due from the garnishee at the time of service of process, or does it reach to all earned under the existing contract up to the answer day. This is the third case stated in the opinion in *Phelps v. Railroad Co.*, 28 Kas. 165, and left undecided at that time. Presented now, we are compelled to pass upon it. The ruling of the district court was correct. Garnishee proceedings mean this: the creditor takes the place of the debtor—"only this and nothing more." The former takes only that which the latter could enforce. That which the garnishee owes, whether due or not, is appropriated; but the process has no future effect. It does not touch that which may thereafter be earned, but which will be earned only by the debtor's subsequent labor. This is in accord with the principles underlying garnishee proceedings as stated by the text writers, and is just and reasonable.

There being no other question, the judgment is affirmed.

See *Mooney v. Union Pacific R. R. Co., Garnishee. etc.*, 9 Am. & Eng. R. R. Cas. 181.

ROSENKRANS

v.

LAFAYETTE, B. AND M. R. Co. et al.

(*Advance Case, U. S. Circuit Court, D. Indiana. April, 1883.*)

Upon the consolidation of two incorporated railroad companies, the holder of bonds of one company, containing a clause authorizing their conversion at any time before maturity into the capital stock of the company issuing them, at par, cannot be deprived of the privilege of such conversion, and

relegated to the rights conferred upon him instead by the articles of consolidation, until he has had a fair opportunity, after notice of the contemplated change, to exercise his original rights, and has elected not to do so.

In Equity.

Judd & Whitehouse and C. B. Lawrence for plaintiff.

Harrison, Hines & Miller and R. P. Ranney for defendants.

DRUMMOND, J.—The Lafayette, Bloomington & Muncie Ry. Co., having a capital stock of \$1,000,000, on the first of May, 1879, executed and issued of its first mortgage bonds the amount of \$2,500,000, and also issued its income bonds to the amount of \$1,000,000. To secure both these issues, a mortgage, or deed of trust, was given to the Central Trust Co. of New York. The plaintiff is the owner of five of these income bonds, of \$1000 each. These income bonds contain this clause: "This bond may, at the option of the holder, be converted into the capital stock of the said railway company at par, at any time before maturity." The Lake Erie & Western Ry. Co., with a capital stock of \$3,000,000, also executed in August, 1879, a mortgage, or deed of trust, to the Central Trust Co. of New York, to secure an issue of income bonds to the amount of \$1,485,000. In 1879 these two companies were consolidated, the consolidated company including a railroad from Fremont, in the State of Ohio, through Indiana to Bloomington, in the State of Illinois. By the consolidation, the capital stock of the Lake Erie & Western Ry. Co. was fixed at \$3,000,000. The allegation of the bill is that at the time of the consolidation the stock of both companies was illegally increased, or, as the bill terms it, "watered." By the articles of consolidation there were awarded to the holders of the capital stock of the Lake Erie & Western Ry. Co. \$3,000,000, or 30,000 shares, and to the holders of stock of the Lafayette, Bloomington & Muncie Ry. Co. \$4,000,000, or 40,000 shares, subject to the following proviso:

"Provided, however, that in case the holder or holders of any of the income bonds secured by the mortgages of the first and second parties hereto to the Central Trust Co. of New York shall, at any time after such consolidation, avail himself or themselves of the privilege of conversion into capital stock therein contained, then the said consolidated company shall, and is hereby authorized to, make from time to time such increase in the total amount of its capital stock as shall equal the amount of such conversion of said income bonds, or so many thereof as shall be converted, and for no other purposes."

The articles of consolidation also provided that the directors of the consolidated company "shall be elected by the holders of the stock of the company, and such of its bonds as are invested with the voting privileges, voting in person or by proxy. Every share of stock of such consolidated company, and each one hundred dol-

lars of par value of bonds invested with the voting privilege, shall entitle the holder to one vote, and a majority of all the votes cast shall elect."

There were accordingly issued to the holders of the stock of the Lafayette, Bloomington & Muncie Ry. Co. four shares of the consolidated company for each share which they held of the Lafayette, Bloomington & Muncie Ry. Co. The plaintiff did not surrender his bonds and take stock of the Lafayette, Bloomington & Muncie Co.; and he claims that having the option to surrender the bonds, and take the stock of the company, in giving, by the articles of consolidation, for each share of the old company four shares of the consolidated company, an unjust advantage has been granted to the stockholders and bondholders, and that it was a violation of the original contract made in the income bonds; and therefore, the plaintiff ought to be placed in the same position as the stockholders of the Lafayette, Bloomington & Muncie Ry. Co.

It is also ground of complaint that no notice was given to the bondholders to exercise the option which they had, to convert their bonds into stock prior to or at the time of the consolidation, and that the consolidated company has refused, on demand made, to deliver to the plaintiff the stock of the consolidated company in the same proportion as to the holders of the stock of the Lafayette, Bloomington & Muncie Ry. Co. The mortgages or deeds of trust which have been referred to, in the one case cover the railroad from Fremont, in Ohio, to Muncie, in Indiana, and in the other from Muncie, in Indiana, to Bloomington, in Illinois.

The defendants, by way of defence, allege that ever since the consolidation of the two lines a share of the capital stock of the consolidated company has been of much greater value than a share of the capital stock of the Lafayette, Bloomington & Muncie Ry., and that the income bonds of the latter company are of much greater value in consequence of the consolidation. It is also alleged that personal notice was given to all the stockholders of the Lafayette, Bloomington & Muncie Ry. Co. of the meeting of the stockholders for the ratification of the consolidation agreement, and that they had ample time and opportunity to exchange their bonds for stock before the consolidation, if they had desired so to do. It is also alleged that the plaintiff became the purchaser and owner of the bonds held by him after the consolidation, and with full knowledge of such consolidation and its terms; and became the owner of the bonds held by him more than a year prior to the commencement of this suit.

By the articles of consolidation of December 9 and 10, 1879, the consolidated company was called the Lake Erie & Western R. R. Co. The capital stock of the new company was to be \$7,000,000, divided into 70,000 shares of \$100 each. To the holders of the

stock of the Lake Erie & Western R. R. Co., one of the parties to the consolidation, \$3,000,000, or 30,000 shares, were assigned; to the holders of the stock in the Lafayette, Bloomington & Muncie R. R. Co., another party to the consolidation, \$4,000,000, or 40,000 shares, were assigned. There was a proviso that in case the holders of any of the income bonds secured by the mortgages of the first and second parties, to the Central Trust Co., should desire to become parties to the consolidation by converting their bonds into capital stock, then the consolidated company was to increase the total amount of its capital stock in proportion to the amount of such converted income bonds. Various other provisions were made as to who should be the board of directors of the consolidated company, how they should be elected after the first regular election, and giving to the holders of the stock of the company, or such of its bonds as had been invested with the voting privilege, the right to vote in person or by proxy, and various other provisions not necessary to mention.

The income bonds of the plaintiff were given in May, 1879. If the Lafayette, Bloomington & Muncie Ry. Co. and the Lake Erie & Western Ry. Co. had the right to consolidate the two roads, that right existed prior to the issue of the income bonds, and it may therefore be said that the bonds in controversy in this case were issued subject to the right of consolidation, and it becomes a grave question whether, in prescribing the terms of the consolidation, the Lafayette, Bloomington & Muncie Ry. Co. was obligated to give the same privilege to the holders of the income bonds as to the owners of the stock of the company, where the holders had not chosen to exercise the option conferred upon them by the terms of the bonds. If that were an absolute right, unchangeable and unaffected in any way by the consolidation, then the only construction that can be given to the articles of consolidation, consistent with that view of the case, is that the conversion of the income bonds into stock must be upon the same terms as the conversion of the old stock into the stock of the consolidated company; but if it be assumed that, taking these income bonds subject to the right of consolidation, the company could call upon the holders of the bonds to exercise the right of conversion in view of the changes to be effected by the act of consolidation, then it would seem as though the privilege must have been distinctly given to the holders of the income bonds. In other words, they must have had the power and opportunity of converting their bonds into stock before they could be deprived of the right thus existing.

The allegation of the bill as amended, upon this point, is that no notice was given to the holders of the income bonds of the proposed consolidation, or that the consolidation had been made, or requiring them, as holders or owners of the income bonds, to

make an election as to the conversion of such bonds. The answer by the defendant does not seem to come up to the measure of the allegation made by the plaintiff, which answer is substantially as follows: It denies that notice was not given before or after the consolidation to the holders of the income bonds, informing them of such proposed consolidation. Now, it seems to me that does not go far enough, and does not, with sufficient distinctness, traverse the allegation in the bill upon that subject. It should clearly appear, not only that the bondholders had notice of the proposed consolidation, and its terms, but that the opportunity should have been given to them of exercising the option conferred by the bonds. In other words, they should have had, before their rights could be said to be foreclosed, the power of choice, and it should appear that having this power they had chosen to retain their income bonds instead of the stock thus proffered to them.

I do not wish, unless it is absolutely necessary—and I cannot say that I so regard it in this state of the case—to hold that this consolidation was illegal. If illegal, serious consequences would follow, and affect a large amount of property, and I prefer to place it, in the present state of the case, upon the ground that it should affirmatively appear, before the consolidation was consummated, the holders of the income bonds were distinctly notified, or clearly had the opportunity of converting the bonds into stock and declined to convert them.

The effect of the consolidation was to destroy the capital stock of the two constituent companies, and to substitute for it the stock of the consolidated company, and therefore it was not possible, unless provision were made in the articles of consolidation, to comply with the condition contained in the income bonds. The stock of the Lafayette, Bloomington & Muncie Ry. Co. having ceased to exist, and therefore if, having had the power of choice, the holder of the income bonds has not chosen to exercise it, then, of course, the stock of the old company could not be given to it; so that, as at present advised, I cannot say that if the holder of the income bonds had full opportunity to convert the bonds into stock before the consolidation, and also had full knowledge of the terms of the consolidation and failed to do so, that he would afterwards have the right, for \$1000 of bonds, to obtain \$4000 in stock of the consolidated company. Neither am I prepared to say that the consolidation of the two companies was necessarily invalid, and the only decision that the court now makes is that it does not clearly appear by the answer that the holder of the income bonds had the right which, by the terms of the contract, was conferred upon him.

See Taggart v. Northern Central R. R. Co., 39 Md. 557.

NASHUA AND LOWELL R. R.

v.

BOSTON AND LOWELL R. R.

(Advance Case, U. S. C. Ct. Dist. Mass. 1884.)

Two railroad corporations, chartered under the laws of different States and afterwards consolidated under the laws of both, are separate in so far that each State is left the control over the charter it grants, and identical in so far that the corporations may represent each other in suits by or against either of them.

The pooling agent, under a contract between railroad companies, is a trustee, and as such is accountable in a court of equity for his acts.

The plaintiff is entitled to join as defendants with the corporation all persons into whose hands they can trace the funds of the joint management.

A pooling contract being once executed, one corporation is estopped from denying the validity of its own act in making it, in defence of an action for its infraction brought by the other. Still less can the agents of the parties set up such a defence.

In Equity.

F. A. Brooks for plaintiffs.

S. A. B. Abbott for defendants.

NELSON, J.—The bill sets forth, in substance, that for the term of 20 years from and after October 1, 1858, the Nashua & Lowell R. R. and the Boston & Lowell R. R. were operated jointly under a pooling contract, by the terms of which both roads were to be placed under the control and management of a joint agent to be appointed by the directors of the two corporations, and the joint earnings and expenses were to be shared in the proportion of 31 per cent of the whole to the plaintiff and 69 per cent to the defendant corporation, the division to be made on the first days of April and October in each year; that the defendant Hosford was appointed and acted as the joint agent under the contract from April, 1875, until the expiration of the contract; that the defendant Bartlett, who was also the treasurer of the defendant corporation, was appointed and acted as cashier of the joint funds; that Hosford, while agent, had, in violation of the contract and without authority, paid over to the defendant corporation from the joint earnings large sums of money, amounting, as alleged, to \$208,086, being 31 per cent of the interest, reckoned at 7 per cent a year, from 1872 to 1878, on the entire outlay of the defendant corporation in the erection of new passenger stations in Boston and Winchester, in building the Mystic River R. R., and in purchasing certain shares of the Salem & Lowell and Lowell & Lawrence Railroads (after deducting dividends on the shares), the whole of

which expenditure was, by the terms of the contract, to be borne solely by the defendant corporation; that Bartlett, at the termination of the contract in 1878, had in his possession as cashier the sum of \$60,000 of the joint funds, 31 per cent of which belonged under the contract to the plaintiff; and that, acting under the direction of the defendant corporation, he had refused to pay the plaintiff its share thereof, but had either retained such share in his own hands, or had paid it over to the defendant corporation. The prayer of the bill was for an account.

The Boston & Lowell R. R. Corporation and Bartlett have demurred to the bill, assigning various grounds of demurrer.

By the familiar rules governing courts of equity the plaintiff is clearly entitled to equitable relief upon the case stated in the bill. The joint earnings of the roads constituted a trust fund in the hands of the joint agent, to be held by him as a trustee for the benefit of the two corporations, and to be applied by him in the manner specified in the contract. A failure on his part to perform this duty rendered him liable to account to the party aggrieved. If, through the mistaken or wrongful act of the agent, the Boston and Lowell road has received a larger share of the net earnings than belonged to it under the contract, the plaintiff is at liberty to follow the fund into the hands of the defendant corporation and compel its restitution. If, as the defendants argue, the pooling contract was not within the corporate powers of the parties to it, that can afford no defence to the Boston and Lowell road, when called upon to restore to the plaintiff the sums received in excess of its due share. As the contract has been fully executed, and the defendant road has availed itself of all the benefits to be derived from it, that corporation is now estopped to deny its validity. Still less can the agents of the parties set up a defence of this character which is not open to their principals.

Bartlett is properly joined as a defendant. The plaintiff is entitled to join as defendants with the defendant corporation all persons into whose hands it can trace any part of the funds of the joint management.

It has already been decided in this case that the plaintiff, as a corporation chartered by the laws of New Hampshire, can maintain this suit in this court against the defendants, who are citizens of Massachusetts, although the plaintiff is a part of a joint or consolidated corporation under the laws of New Hampshire and Massachusetts. Corporations thus created are separate for the purposes of jurisdiction, and to enable each State to exercise control over the charters which it grants and over the acts of the corporation within its own limits. But the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. *Horne v. Boston & M. R. R.*, 12 Am. & Eng. R. R. Cas.

287. The Massachusetts corporation is therefore not a necessary party to this bill.

The bill waives an answer under oath. By waiving the oath no discovery is sought, and it is not necessary to interrogate the defendants specially and particularly upon the statements of the bill. Equity rules 40, 41.

The bill prays that the defendant corporation may answer by its president, J. G. Abbott. This must be regarded as mere surplusage, and not as ground of demurrer. The plaintiff is entitled to the answer of the corporation, but has no right to require that it shall answer by its president.

Demurrers overruled.

Effect of Consolidation of Railroad Companies of Different States.—Where two railroad companies created by the laws of different States consolidate by virtue of concurrent legislation, the new company is considered as a corporation of each State. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219; *Sprague v. Hartford, P. & F. R. Co.*, 5 R. I. 233; *State v. Metz*, 8 Vroom (N. J.), 199; *McGreger v. Erie R. Co.*, 88 Ill. 615; *Boardman v. L. S. & M. S. R. Co.*, 4 Am. & Eng. R. R. Cas. 265. Although according to some authorities two distinct and separate legal entities are considered as being in existence. *Racine & M. R. Co. v. Farmer's Loan & Trust Co.*, 49 Ill. 331; *Cram v. Same*, 5 Rob. (N. Y.) 226; *Ohio & M. R. R. Co. v. Wheeler*, 1 Black, 286.

Construction of Charter as Contract.—Where a corporation is created by the concurrent legislation of two States, the charter will be liberally construed as a compact between the States for the benefit of the citizens of both of them. *Covington v. Covington & C. Bridge Co.*, 10 Bush, 69; *Brocket v. Ohio & P. R. Co.*, 14 Pa. St. 241; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Union Branch R. Co. v. East Tenn. & S. R. Co.*, 14 Ga. 327.

Jurisdiction as to Corporate Property.—As regards the corporate property in each State the courts of that State have full jurisdiction over it. *Taylor v. Atlantic & Gt. W. R. Co.*, 57 How. Pr. 9; *In re United States Rolling Stock Co.*, 57 How. Pr. 16; *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613; *Ellis v. Boston H. & E. R. R. Co.*, 107 Mass. 1; *In re Sage*, 70 N. Y. 220; *Peck v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Ohio & Miss. R. R. Co. v. Weber*, 5 Am. & Eng. R. R. Cas. 101. But the courts of one State have no jurisdiction as to property wholly in the other State. *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457.

Jurisdiction as to Corporate Matters Generally.—Where a corporation is created by the laws of two or more States, proceedings involving the whole corporate character and existence may be instituted in the courts of either State.

Injunctions.—It may therefore be restrained by injunction from using the corporate funds for other than corporate purposes by the courts of either State. *March v. Eastern R. Co.*, 40 N. H. 458; *Fisk v. Chicago, R. I. & P. R. Co.*, 4 Abb. Pr. (N. S.) 378; *State v. Northern Central R. Co.*, 18 Md. 198; *Balt. & Ohio R. R. Co. v. Gloom*, 28 Md. 287.

Foreclosure.—The courts of either State may foreclose mortgages of the corporate property wherever situate. But the purchaser at the foreclosure sale will take subject to the liens existing against the property in the other State. *Hand v. Savannah & C. R. Co.*, 12 S. C. 314; *Mead v. N. Y. & N. H. R. R. Co.*, 45 Conn. 199; *McElrath v. Pittsburgh & S. R. Co.*, 55 Pa. St. 189; *Muller v. Dowa*, 94 U. S. 444.

The circuit court of the United States for a district in one State may appoint a receiver for the whole line of such a railroad company, even though such line may extend through several States. *Wilmer v. Atlantic & R. A. L. R. Co.*, 2 Woods, 409.

Bankruptcy and Insolvency.—Where a corporation is created by the laws of two or more States, bankruptcy proceedings may be instituted in either State against it. *In re Boston H. & E. R. Co.*, 9 Blatch. 101.

Such a corporation may be wound up and dissolved in one State, without its franchise in the others being affected. *Hart v. Boston H. & E. R. Co.*, 40 Conn. 524.

Amendments to Charter.—Where a corporation derives its corporate existence and franchises from more than one State, its charter may be amended by one of such States so as to control its actions and property therein, even though such amendment may be opposed to the constitution and laws of some other State whereby it has also been incorporated. *Covington v. Covington & C. Bridge Co.*, 10 Bush, 69.

Removal of Causes.—As to the right to remove a cause to United States courts where a corporation created by the laws of two States is a party, see *C. & W. I. R. Co. v. L. S. & M. S. R. Co.*, 1 Am. & Eng. R. R. Cas. 627; *Uphoff v. Chicago, etc., R. Co.*, 1 Am. & Eng. R. R. Cas. 628.

Taxation.—As to the taxation of corporation composed of consolidated companies of different States, see *Ohio & Miss. R. R. Co. v. Weber*, 5 Am. & Eng. R. R. Cas. 101; *State Treasurer v. Auditor-General*, 18 Am. & Eng. R. R. Cas. 296; *Lake Shore & M. S. R. Co. v. People*, 46 Mich. 198.

Pooling Agent.—As to the appointment of such an officer, see *Burke v. Concord R. R. Corp.*, 8 Am. & Eng. R. R. Cas. 552; *State ex rel. v. Concord R. R. Corp.*, 18 Am. & Eng. R. R. Cas. 94.

MILLS et al., Executors,

v.

CENTRAL R. R. Co. OF NEW JERSEY et al.

(*Advance Case, U. S. Circuit Court, District New Jersey. May 2, 1884.*)

A bill was filed by the stockholders of a railroad corporation to set aside a lease of the road which was alleged to be void and contrary to law. Defendants moved to remove the case to a United States Court on the ground that the lease was justified by a State statute which the complainants averred to be in violation of the original charter contract.

Held, that as this contention was not raised by the pleadings, the mere possibility that it might be raised at a later stage in the cause did not warrant the removal of the cause into the United States Court.

In an action where the main controversy is between citizens of the same State, there being no controversy wholly between citizens of different States which can be fully determined as between them, the suit is not removable from the State to the United States courts on the ground of citizenship, under section 2, act of March 8, 1875; and when it has been removed, a motion to remand will be granted.

On Bill. On motion to remand.

H. C. Pitney (with whom was Mr. Gummere) for motion.

James E. Gowan contra.

NIXON, J.—The bill of complaint in this case was originally filed on August 28, 1883, in the court of chancery of New Jersey. The defendants put in a joint and several answer on December 14, 1883, and on the second of February following they presented a petition to the State tribunal praying for the removal of the suit to this court. The petitioners based their right of removal on two grounds: (1) Because the defendants justified the execution of the lease, which the complainants were seeking to set aside, under the provisions of an act of the legislature of New Jersey, approved March 10, 1880, wherein an attempt was made to alter and amend the charter of incorporated companies, without the consent of all the stockholders, which the complainants allege to be in violation of the constitution of the United States; and (2) because the only necessary and substantial parties to the controversy were the Central R. R. Co. of New Jersey, and the Philadelphia & Reading R. R. Co., which were corporations respectively of New Jersey and Pennsylvania.

Is there a federal question necessarily involved? A careful examination of the pleadings and the issues there presented fail to disclose one. It is true that the defendants in their petition set forth that their right to make the lease which the complainants are endeavoring to avoid is rested by them upon a certain statute of the State of New Jersey, passed March 10, 1880, authorizing corporations organized under any of the laws of the State to lease their road, or any part thereof, to any corporation of New Jersey or any other State, and allege that the complainants contend that said statute is null and void because it violates the provision of the constitution of the United States that no State shall pass any law impairing the obligation of contracts. But no such ground of relief is found in the bill of complaint, nor is it suggested in the pleadings.

It nowhere appears that the complainants invoke the protection of the constitution of the United States or question the constitutionality of any law of New Jersey. They do, indeed, charge that the lease is void and has been executed contrary to law, but they make no specific statement in what respect or upon what ground it is illegal. It is hardly competent for the defendants to incorporate into their petition for removal a possible federal question that may arise during the progress of the case, especially when the question is not only not suggested by the complainants, but is expressly disavowed and repudiated by them, and then to claim that the removal of the controversy into a federal court is proper in order to have it adjudicated. If it should appear during the continuance of the cause that a federal question is necessarily involved, I do not say that no appeal would lie from the highest State tribunal to the supreme court, but I do say that the defendants should not be allowed to transfer the case from the chosen jurisdiction of

the complainants upon the bare suggestion of a contingency which may never happen.

With regard to the second ground a more difficult question is presented. The difference of views of the respective parties arises from the different conceptions of the learned counsel respecting the real parties to the controversy, and the purposes and objects of the bill of complaint.

The defendants allege that the right of the complainants to bring such an action is based upon the assumption of their right, as stockholders, to represent the Central R. R. Co. of New Jersey; that the relief asked for in the bill of complaint is not merely relief for the complainants as such, but for all the stockholders, and for the said corporation of which they are the representatives; that whether the claims of said company are asserted by its governing body or by one of its stockholders, it is the company itself which is the party to the suit; that the individual defendants are not necessary and substantial parties to the litigation; and that, even if they are, the case discloses a controversy wholly between two corporations of two different States, which can be fully determined as between them without the presence of the other parties.

The complainants, on the other hand, insist that the Central R. R. Co. is the naked trustee of the complainants; that the latter have a beneficiary estate and interest in the lands, franchises, tolls, and all other property in its possession and under its control as trustee; that the execution of the lease and contract was a breach of trust, and a diversion of the trust property to strangers without authority of law; that, so far from there being identity of interest between the complainants and the New Jersey Central R. R. Co., the controversy between them is actual, and in every sense antagonistic; that the individual defendants are made parties, not formally, but for the purpose of obtaining specific relief against them as active agents in making an unlawful transfer of their property; and that no separate controversy can be found between any two parties, citizens of different States, which can be fully determined between them without the presence of the other parties to the action.

It is conceded that support is found for the defendants' view in the case of *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277. In that case the plaintiffs, citizens of Colorado and stockholders of the Denver Pacific R. R. Co., a corporation of Colorado, filed a stockholders' bill in a State court of Colorado against the said Denver Pacific R. R. Co. and its directors, and the Kansas Pacific R. R. Co., a corporation of Kansas, and certain individual citizens of other States than Colorado. The object of the suit was to obtain an accounting with the Kansas Co. and other defendants on an allegation that a majority of the trustees of the Denver Co. had been committing frauds, and thus depriving that company of

the funds belonging to it. The relief prayed for was a decree in favor of the Denver Co. for the sum found due on the accounting. Mr. Justice Miller said that the interests of the plaintiffs and of the Denver Pacific Co. were identical; that if the suit was successful no decree could be entered in favor of the defendants, but only in favor of the Denver Co. for the amount found due; and that such was the flexibility of the mode of proceeding in a court of chancery, that, where a party refused to be the complainant in a suit, other interested parties might file a bill and make him a defendant, without changing his relations to the controversy; and that, under such circumstances, the court had power, for the attainment of justice, to render a decree in favor of one defendant against the other. Observing that no relief was asked against the individual defendants, he treated them as not necessary parties to the suit, and retained the case as one of federal cognizance, because the real controversy was, in fact, between the two corporations of different States. But it seems to me that the cases are distinguishable. In the latter, neither the Denver Pacific R. R. Co. nor its board of directors, as such, was complained of. No relief was prayed for against the corporation, but in favor of the corporation against the fraudulent acts of a part of its trustees. All the material defendants against whom relief was asked were citizens of other States. There was nothing to be adjudicated against parties living in the same State. But in this case the suit is against the Central R. R. Co. and a number of individuals, some of whom are citizens of the same State with the complainants, and others are citizens of different States, and specific relief is prayed against the acts of the corporation and of the individuals who are made defendants. Even if the theory should be adopted that the New Jersey Central R. R. Co. is the real complainant, some of the defendants against whom relief is sought are citizens of the same State, and they are indispensable parties, if the complainants are to have determined the questions raised in the pleadings, and to have extended to them the full measure of relief which they pray for.

The case of *Bacon v. Rives*, 106 U. S. 99, does not help the defendants in their contention. The court there held that the executors of George Rives were not necessary and substantial parties to the issue between the complainants and the principal defendant, because no relief was prayed for against them; that they were made parties for the sole purpose of reaching the interest of George C. Rives in his father's estate, in their hands, if the complainants should succeed in their suit against him. Though made formally defendants, they were regarded substantially as mere garnishees. But, in the present case, specific relief is sought against the individual defendants, who are charged to be personally responsible for their alleged illegal acts in the misapplication of property which they held as trustees of the complainants. It falls

rather within the principle of *Corbin v. Van Brunt*, 105 U. S. 576, where the suit was for the recovery of land, and damages for its detention. The controversy in regard to the recovery of the land was between citizens of the same State, and the one for damages for detention between citizens of different States. The court held that separate and distinct trials of these issues were not admissible, and that the case should be remanded to the State court from which it had been improperly removed.

Regarding the action as one where the main controversy is between citizens of the same State, and not finding in it any "controversy wholly between citizens of different states and which can be fully determined as between them," I must hold that the suit is not removable, on the ground of citizenship, under the second section of the act of March 3, 1875, and the motion to remand must prevail.

KANSAS AND EASTERN R. R. CONSTRUCTION Co. et al.

v.

TOPEKA, SALINA AND WESTERN R. R. Co. et al.

(185 *Massachusetts Reports*, 84.)

A foreign construction company cannot maintain a bill in equity in this commonwealth against a foreign railroad corporation and a citizen of this commonwealth, to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by the construction company in a foreign State, and to restrain by injunction the citizen of this commonwealth from disposing here of shares of stock and bonds of the railroad company, alleged to have been delivered to him in violation of the plaintiff's rights, although the railroad corporation has an office in this commonwealth for the transfer of shares of its capital stock, and has appeared by attorney in the suit.

G. O. Shattuck and H. W. Swift for the plaintiffs.

W. Gaston and C. L. B. Whitney for the defendants.

DEVENS, J.—This is a bill in equity, brought by a construction company, organized under the laws of the State of New Jersey, and William H. Rollins, of Portsmouth, New Hampshire, against a railroad corporation organized under the laws of the State of Kansas for the purpose of constructing and operating a railroad therein, and against Charles G. Patterson, of Boston in this commonwealth, and Weston Arnold, of Council Grove, Kansas. The case comes before us on an appeal by the plaintiffs from a decree made by a single justice of this court, sustaining demurrers filed by the several defendants, and ordering the bill to be dismissed.

The bill sets forth a contract made between the construction company and the railroad company, together with a supplementary contract, which we treat as a part of it, by which the construction company agree to build, upon certain terms and conditions, a railway in Kansas, and the railroad company was to pay therefor its whole issue of mortgage bonds at the rate of \$17,000 per mile, and seventeen twentieths of its capital stock, less the amounts to be delivered to certain cities and towns which had made subscriptions therefor. By the terms of the contract, the construction company was not only to build the road, but to pay to Arnold, as trustee for certain persons entitled thereto, the sum of \$20,000. Who these persons were does not fully appear, but they are described as persons who had previously rendered services to, or advanced money for, the railroad company. Upon payment of the sum of \$20,000, the certificates for seventeen twentieths of the capital stock were to be handed to the plaintiff Rollins, to hold as trustee of the construction company, to be delivered to it as from time to time the general manager of the railroad company might direct. The construction company was to receive all the property which the railroad company might hold, together with all the subscriptions which had been made by cities or towns, except the sum of \$34,000, which was to be paid to Arnold as trustee; and, as such trustee for the benefit of "those entitled thereto," Arnold was to receive ten per cent of the profits of the construction company.

The bill avers that the railroad company has refused to perform its part of this contract; that it has since made a contract with the defendant Patterson for the construction of the same railway, to be paid for in shares of stock and bonds; and that Patterson now advertises the same for sale in Boston. The bill further avers the payment of the \$20,000 to Arnold, and the willingness of the construction company to do all on its part yet to be done in the construction of the road. The contract between the construction company and the railroad company is an exceedingly complicated one, and, in many respects, not easy to be construed. The outline we have thus given, with such of its details as may be referred to hereafter is sufficient for the purpose of this opinion.

The prayer of the bill is that the railroad company and Arnold may be compelled specifically to perform their contract, to make all such conveyances to the plaintiffs as they are bound to make, and generally to do all such acts as are necessary for carrying out the contract; and especially that the railroad company now be ordered to deliver seventeen twentieths of the capital stock, less the deductions it was entitled to make therefrom, to the plaintiff Rollins, as trustee for the construction company, and three twentieths to the defendant Arnold as trustee for those entitled thereto. The further prayer is, that the railroad company may be restrained by injunction from doing any acts under its so-called contract with

the defendant Patterson, or delivering to him any of its shares of stock or its bonds or other property; that the defendant Patterson may be restrained from offering to sell, or selling, any of the bonds or shares of stock in the railroad company that may have been delivered to him; and that he may be compelled to surrender the same to the construction company, averring that he had full notice of the agreement between the construction company and the railroad company.

No act is alleged to have been done, nor as intended to be done, in this State, except the proposed sale by Patterson of shares of stock and bonds issued to him under the second contract alleged to have been made with him.

The contract between the construction company and the railroad company is one the validity of which must be determined by the law of the State of Kansas. It was to be executed there in all important particulars; it concerned a public work to be constructed there, to which the cities and towns in that State had made subscriptions, and all the rights, duties, and obligations of the railroad company were derived from, or imposed by, the law of that State, from which it received its corporate existence. Whether a contract would there be valid, which seeks to transfer all these rights, obligations and duties, together with the control of the railroad company and of all the shares of stock and bonds which it has the right to issue only for the purpose of building its road, either to the construction company or to a trustee "for the benefit of persons entitled thereto," in consideration of the covenants by the construction company to build the road, it is not necessary for us to consider. If we assume it to be valid, and we certainly do not intend so to decide, the difficulty in the plaintiffs' case would not disappear. It would still be impossible for us to enforce any specific performance of such a contract.

Much of the argument of the construction company treats the subject-matter of the suit as if it only concerned the delivery of the certificates of stock, or as if the suit might be thus limited. The agreement to deliver these certificates cannot be separated from the rest of the contract, and the covenants on the one side and the other are mutual and interdependent. The contract as yet is entirely executory. The fact that the construction company has made some preliminary surveys, or has paid \$20,000 as a condition precedent to receiving the certificates of stock, cannot take it out of this class of contracts. The work contemplated has never been begun by the construction company, nor has the line ever been located. The delivery of the certificates is a step only in the execution of a contract which many years may be required to complete. To compel the railroad company to deliver the certificates, if we cannot hold the construction company to the performance of the obligations it has assumed, would be obviously unjust. If we

are powerless to enforce the contract, so far as burdens are laid by it on the construction company and the covenants made by it, we should decline to enforce any portion of it. *Ross v. Union Pacific Ry.*, Woolw. 26; *South Wales Ry. v. Wythes*, 1 K. & J. 186, 202.

Nor, if we are unable to enforce the delivery of the certificates to the construction company, is there any reason why we should interfere to prevent their delivery to the defendant Patterson, with whom the second contract is alleged, or the sale of the stock here by him. The ground urged for enjoining this is that it may prevent the railroad company from performing its obligations under the former contract with the construction company. Such right can be only incidental to our right to enforce the original contract, and must depend upon that. *Ross v. Union Pacific Ry.*, *ubi supra*.

The question whether a contract for the construction of a railway can ever be enforced, has been fully considered in many cases. *Ross v. Union Pacific Ry.*, *ubi supra*; *Fallon v. Railroad Co.*, 1 Dillon, 121; *South Wales Ry. v. Wythes*, *ubi supra*; and 5 DeG., M. & G. 880; *Peto v. Brighton, Uckfield & Tunbridge Wells Ry.*, 1 H. & M. 468; *Greenhill v. Isle of Wight Ry.*, 19 W. R. 345; *Port Clinton R. R. v. Cleveland & Toledo R. R.*, 13 Ohio St. 544; *Danforth v. Philadelphia & Cape May Ry.*, 3 Stew. Eq. 12. Whether this contract is capable of enforcement has been also very fully discussed in the case at bar. It has been argued that a court of equity will not undertake to enforce such a contract, as it is vague and uncertain in its terms, depending, as to these, on the agreement of parties or third persons, as the time when, and the places where, the construction of the road shall begin are yet undetermined, as are its location and general route; and especially as the continuous attention to details which would be required, and the time which would be necessarily employed, would render supervision practically impossible. These and many other suggestions we have not had occasion carefully to examine, as there are decisive reasons why in the present case there can be no specific enforcement of the plaintiff's portion of the agreement, or of the covenants to be performed by it.

What the construction company agreed to do is to be performed in another State, and directly concerns the administration of the local affairs of that State. This court cannot protect the railroad company, by any decree which it can render, in the rights which it must have against the construction company, if the latter is to receive this stock. The liabilities which the railroad company is under in regard to the construction of the railway in Kansas, as well as those which the construction company has assumed, must be determined by the local law of that State, as administered by its appropriate tribunals. At every step, these must have the right to determine, as occasions for intervention arise, whether the

duty imposed upon the railroad company is being performed and the laws of the State observed. The suit has relation to the performance by the construction company on behalf of the railroad company of the chief functions of the latter as a corporate entity, the building and operation of its railway in Kansas. As to such a series of acts as are thus involved, this court could certainly exercise no jurisdiction. It cannot assume to direct how, when, or where the railway shall be constructed, nor give any direction in relation thereto, nor enforce the obligations which the construction company has undertaken to perform in regard to it. Were this possible, the difficulty would then be presented which arises from the fact that the construction company is a foreign corporation, having of right no existence here. Its organization is not subject to our supervision, nor are its officers, its place of business or its property within our jurisdiction. Its own rights, in making contracts like that here presented, must depend on the local laws which govern its creation, and, whatever these may be, we have no such control over it that we could enforce any decree against it.

This consideration presents also a decisive reason why, as against the railroad company, the contract cannot be specifically enforced, even if the enforcement of it, with justice to both parties, could be limited simply to a decree for the specific delivery of the certificates of the capital stock. The subject-matter of such a claim has no analogy to one that might be made upon a demand as for a debt due according to the generally recognized principles of laws, where satisfaction is sought out of property or rights within our jurisdiction, by reason of the authority which the State has over that which is within its limits. A judgment against a foreign corporation in another State can be operative only to the extent of the property and rights which are there found. *Smith v. New York Ins. Co.*, 14 Allen, 336. The railroad company has no property which has been attached in this proceeding, nor, so far as appears, any in this State. It has no office for the general transaction of its business, nor any officers for that purpose, except that it has established an office for the transfer of shares of its capital stock. Whether in a controversy between two persons as to which was entitled to certificates of stock, or to their transfer from one to another, this matter could be subjected to the jurisdiction of this court, need not be discussed. This inquiry is whether it is within the power, or a part of the duty, of this court to order this foreign corporation to issue certificates of stock, so that the construction company, or those to whom it assigns the certificates, may thus become members of the railroad corporation. Because this railroad corporation has appeared here by attorney, it has not given this court any right to exercise authority over its organization, its corporate functions, or the relations between the corporation and its members, nor the right to determine who shall be its

members; and this court is not invested with any power by which its decree in such matters can be enforced. The determination of the question who shall be entitled to receive from the corporation certificates of its stock, so that they shall thereby become members of it, is one which does not alone affect the external relations of the corporation, but involves its organic laws, which are necessarily local and require local administration. *Smith v. New York Ins. Co.*, *ubi supra*.

In the case last cited it was held that this court would not entertain jurisdiction of a suit in equity brought by a citizen of Alabama, who had never lived here, against an incorporated mutual life insurance company of New York, to restore him to his rights under a policy upon his life issued by the defendant in New York, he having failed to pay the premiums required by the terms of the policy, although the defendant transacted business in this commonwealth, and had appointed an agent resident here upon whom all lawful processes against the company might be served, under the Gen. Sts. c. 58, § 68; and this upon the ground that the bill sought to establish, by a judgment of this court, the artificial relation of membership in a foreign corporation involving necessarily the peculiar local statute laws of another State. From the nature of corporate stock, which is created by and under the authority of a State, the right or duty to issue it, like the other attributes of the corporation, is governed by the local law of the State from which it derives its existence, and not by that of any other State.

The construction company, for the reasons we have heretofore stated, is not entitled to a decree against the railroad corporation, ordering the certificates of stock to be issued to its trustee. But the construction company further seeks a decree, which shall forbid the railroad company from issuing its shares of stock or its bonds to the defendant Patterson, shall enjoin the railroad company from carrying out the contract with him, and shall compel Patterson to reconvey any property he may have received from the railroad company. None of the acts which the construction company desires thus to enjoin are, so far as is shown by the bill, to be done in this State, nor is any of the property here which is thus sought to be ordered to be reconveyed. It is averred, however, that Patterson is preparing to sell the shares of stock in this State; and the construction company contends that this question arises in this State, as this wrongful act thus sought to be prevented is to be done here. But the considerations to which we have heretofore adverted directly apply. If we cannot determine to whom this railroad company shall issue its shares of stock, we, on the other hand, cannot forbid its issuing them to those whom it chooses. If it issues shares of stock by authority of the local law which governs it, the sale of such shares in the ordinary mode should not be interfered with. As we cannot establish and enforce

the first contract by any decree that we may make for its specific performance, nor indeed pronounce authoritatively whether it is one which should be established and enforced, as it concerns so largely a matter of local law, and as it may be administered by the local tribunals in the place where it was to be performed, we ought not to interfere with the sale of the shares of stock, should any be issued to the defendant Patterson.

Bill dismissed.

WOODRUFF

v.

ERIE RY. Co. et al.

(98 *New York Reports*, 609.)

While a railroad corporation organized under the General Railroad Act of this State has no express authority, under the said act, to lease its road and franchises to an individual, such a lease is neither *malum in se* nor *malum prohibitum*, nor is it void as contrary to public policy.

A lessee, who has under such a lease had the possession and use of the property, is estopped from questioning its validity in an action to recover the stipulated rent.

The estoppel which thus binds the lessee also binds all who claim through or under him; and one to whom he has transferred his interest in the demised property, and who has had the use and occupation thereof, may not question the validity of his lease.

One who has placed the means for paying a debt in the hands of another, upon his covenant to pay the same, may maintain an action in equity to compel a performance of the covenant, without first paying the debt; he is not limited to his action on the covenant.

The E. & G. V. R. R. Co. leased its road, properties and franchises to plaintiff, for the unexpired term of its charter, he covenanting to pay as rent a specified sum, by paying and taking up interest coupons, to the amount specified, upon bonds issued by the company. Plaintiff entered into the use and occupation of the property and subsequently leased the same to the E. R. Co. By various orders of the Supreme Court, granted in actions to which the company last named and all interested in its property, as incumbrances or otherwise, were parties, defendant J. was appointed receiver of said property, with authority to continue the operation of the road of the company, and also, in his discretion, all roads leased by it, including that so leased to it by plaintiff, and to pay any rent then due and thereafter becoming due under the leases. J. took possession of the E. & G. V. road, and continued to hold and operate it in connection with the other lines placed under his control as such receiver. In an action to compel J. to pay, out of funds in his hands applicable thereto, the coupons falling due on the bonds while he acted as receiver, *held*, that he was estopped from denying the validity of the lease to plaintiff, or of that from him to the E. R. Co.; that as none of the parties had appealed from the orders appointing J. and defining his powers, they could not dispute or question said powers; that the court had full authority to direct how the property should be managed while in the

possession of the receiver; that whatever might be the rights of the various parties, as between themselves, to priority in the distribution of the assets of the insolvent corporation, such rights could affect only the property remaining after the liabilities created by the receivership had been fully paid; that the receiver, by taking possession of and occupying the leased property, manifested his election to continue the lease, and incurred a liability to pay the rent according to its terms; that plaintiff, by his contract with the E. R. Co., became, so far as the latter was concerned, a mere surety for the payment of the debt and had the right to call upon it and upon the receiver, for the period of his occupancy, to indemnify and protect him; and so, that the plaintiff was entitled to the relief sought.

Also *held*, that the court had power to authorize an action to determine the rights of the parties, instead of determining them upon a motion.

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, made October 28, 1881, which reversed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the material facts are stated in the opinion.

John A. Van Derlip for appellant.

E. C. Sprague for respondents.

RUGER, C. J.—By leave of court, the plaintiff has brought this action against the defendants, upon a claim accruing upon a lease of the property of the Erie and Genesee Valley R. R. Co. executed by him in 1871 to the defendant, the Erie Ry. Co., to require its receiver to pay out of funds in his hands applicable to such purposes, for the use of the leased property, during its occupancy and enjoyment by such receiver in the years 1875, '6, '7 and '8.

The receiver, upon being requested by the plaintiff to pay rent, first claimed that the conveyance by which the plaintiff acquired possession of and an interest in the Erie and Genesee Valley road was ultra vires, and that the title thereby claimed by the plaintiff as well as that attempted to be conveyed by him to the Erie Ry. Co. was invalid and imposed no legal obligation upon him.

This fact, instead of leading, as would be supposed, to a surrender, by the receiver, of the property thus claimed to be illegally held by him, merely led to a refusal to pay the rent reserved in the lease to the Erie Ry. Co.

For upwards of three years the defendant Jewett, as such receiver, continued in possession of the property acquired under such lease, and continued to use and operate it as a railroad in connection with the main, and subsidiary lines of the original Erie Ry. Co.

Upon the trial of the action the defendants urged not only the original objection to the plaintiff's claim, but also several additional grounds of defence, all of which were overruled by the Special Term and judgment was ordered for the plaintiff.

Upon an appeal therefrom by the defendants the General Term reversed the judgment of the Special Term, and ordered a new trial, upon the ground that the conveyance by which the plaintiff acquired his interest in the property of the Erie and Genesee Valley R. R. Co. was ultra vires, and he, therefore, was under no legal obligation to that company and took no interest in its property, by the conveyance to him. The court further held that, considering the lease to have been a valid obligation, the plaintiff, being under no legal obligation to pay such rent, and not having paid it to the persons thereby entitled, did not occupy such a position or have such an interest as entitled him to maintain an action to enforce the specific performance of his contract with the Erie Ry. Co.

The plaintiff, having appealed to this court upon the usual stipulation from the order of the General Term, is met with these and other objections to his right to recover.

The instrument by which the plaintiff acquired an interest in the property of the Erie and Genesee Valley Ry. Co., which was a corporation duly organized to build and operate the railroad in question, must be regarded for the purposes of this action as a simple lease of the property for an agreed annual rental of \$8400, which the plaintiff Woodruff expressly covenanted to pay therefor.

The manner of payment agreed upon was, that the plaintiff should pay the interest to whomsoever due upon a certain mortgage for \$120,000, given by the Erie and Genesee Valley R. R. Co. to certain parties to secure the payment to the holders of bonds for that amount, which had been negotiated by the company; although other stipulations between the parties were contained in the agreement produced in evidence, their consideration was waived on the trial, and they do not affect the questions presented on this appeal.

The annual rent reserved by the contract was fixed, and that sum was never to be increased, and could be decreased only by the payment in gross by the plaintiff to the parties therein appointed to receive it, of the sum of \$120,000, being a principal, which, at the then legal rate of interest, would produce annually the amount agreed upon as rent. In the event of such payment, the obligation to pay rent was to be reduced to a nominal sum, and the lessees would become entitled to retain possession of the property described to the end of the term. Provision was also made for a surrender of the property by the lessee to the lessors upon the expiration of the term, or the annulment of the lease for other causes.

Immediately after the execution of this agreement by the parties, and its ratification by the stockholders of the lessors, the plaintiff entered into possession of the property demised. On November 8, 1871, the plaintiff, by a written instrument, mutually executed by the parties thereto, leased to the Erie Ry. Co. all of the property

acquired by him from the Erie and Genesee Valley R. R. Co. for the term, and upon covenants and conditions similar to those contained in the lease, by which he acquired his interest in the property.

We do not think that either of those leases was void as being either *malum in se*, *malum prohibitum*, or contrary to public policy. Neither do we think that they can be avoided by the respective lessees thereof on account of any want of power on the part of the respective lessors to make such contracts. Such objections come with an ill grace from a corporation which has acquired possession of nineteen independent lines of railroad by virtue of leases, and which is now occupying and enjoying the use thereof, and such party is entitled to such consideration only from the court as the strictest rules of law require.

Whatever may be the rule in other States or in England, the public policy of this State, as manifested by numerous acts of the legislature, has always been, not only to afford the fullest scope for the consolidation and reorganization of non-competing railroads and railroad corporations, but also for the transfer of the use of such roads and their franchises by one corporation to another.

The first statute passed on this subject was chapter 213 of the Laws of 1839, and is a general law, consisting of a single section providing as follows: "It shall be lawful, hereafter, for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contracts," but not in a manner inconsistent with the provisions of the charter of the company whose road was to be used under such contract.

This act has never been repealed, and has been held by this court to confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations, by lease, the exclusive right to use and enjoy the property and privileges of the lessor in such contract. *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *People v. A. & Vt. R. R. Co.*, 77 id. 232; *T. & B. R. R. Co. v. B., H. T. & W. Ry. Co.*, 86 id. 107.

Since this act various statutes have been enacted in this State, recognizing the validity of such leases, and imposing duties and obligations, as well as conferring powers upon the lessees of railroads with a view of enlarging the benefits and privileges enjoyed by them under such transfers. Among those acts may be cited chapter 222, Laws of 1847; chapter 302, Laws of 1855; chapter 582, Laws of 1864; chapter 254, Laws of 1867; chapters 237 and 844, Laws of 1869; chapter 349, Laws of 1880.

It is significant on this question that chapter 582 of the Laws of 1864 requires individuals as well as railroad corporations, who might be operating leased railroads, to build and maintain the

fences required by other statutes to be kept up and maintained along railroad routes.

While it has been held that this statute did not, of itself, confer express power upon a railroad corporation to lease its roads and franchises to an individual (*Abbott v. Johnstown, etc., R. R. Co.*, 80 N. Y. 27; 36 Am. Rep. 572), yet it clearly recognized the validity of such an act whenever competent authority is obtained to make such lease. It would seem to follow from these statutes that the supreme legislative authority of this State does not regard the transfer of the property and privileges of one railroad corporation to another with a view of their operation by the lessees thereof, as either contrary to good morals or public policy.

If such be the rule with reference to transfers by one corporation to another, there would seem to be no distinction so far as the morality of the transaction is concerned between such a transfer and a like transfer to an individual. The vice, if any, is in the act itself and not in the person by whom it is done. *Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258. The transfer to an individual may not be expressly authorized by statute, but neither is it expressly prohibited, and the validity of such a transfer, granting the power to make it, is recognized by chapter 582 of the Laws of 1864.

We have carefully examined the several cases cited by the learned counsel for the respondent, in support of the claim that the lease to the plaintiff was contrary to public policy, and, therefore, void, and do not think them applicable to the condition of the law as it exists in this State.

The cases in England and the several States of Vermont, Massachusetts, New Jersey and Ohio referred to, arose under statutes whereby all transfers of corporate franchises were either impliedly prohibited or wholly unauthorized.

The case of *Abbott v. Johnstown R. R. Co.* held simply that a railroad corporation could not, without the consent of the State, "change its terms or absolve itself from any of its obligations by any conventional arrangement with third persons as to the control and management of its road." The principles there laid down are applicable only to cases arising between third persons and railroad corporations who have transferred the control and operation of their roads to individuals, and do not purport to decide anything as to the respective rights of the parties to such contracts.

We do not consider it necessary in this case to determine the question whether a lease by a railroad corporation of its property and privileges to an individual is ultra vires or not, as we think it is well settled by authority that a grantee in such a conveyance, at least so far as the contract has been executed, is estopped from contesting the title of his lessor or the validity of the conveyance by which he has acquired possession of the leased property. Platt

on Leases, 57, 58; *Vernam v. Smith*, 15 N. Y. 327; *Ingraham v. Baldwin*, 9 id. 45.

The estoppel which binds the tenant also binds all who claim through or under him, and no just reason can be alleged why any distinction should be made between the conveyances in evidence which were respectively made to and by the plaintiff Woodruff. *Taylor's Landlord and Tenant*, §§ 89, 90, 91, 657, 705; *Archbold's Landlord and Tenant*, 219. Not only do we consider the principles of law governing the relations of landlord and tenant applicable to this case, but the general principles of equity relating to the respective rights and liabilities of parties, arising out of contracts between individuals and corporations, which have been partially or wholly performed by either party, preclude them respectively from raising any questions as to the power of the corporation to make such contracts.

There is a manifest distinction between cases arising under contracts which are contrary to public policy or mala in se or mala prohibita, and those which are claimed to be ultra vires alone.

This question has been so fully and ably discussed in this court in the case of *Bissell v. Mich. S. & N. I. R. R. Co.*, 22 N. Y. 258, and *Whitney Arms Co. v. Barlow et al.*, 63 id. 62; 20 Am. Rep. 504, by Judges Selden, Comstock and Allen, that it would be a work of supererogation to attempt to add anything to the arguments there advanced.

The principles determined in the case of *Whitney Arms Co. v. Barlow* seem to control every view which may be taken of the respective rights and liabilities of the parties in the case. Judge Allen there says: "A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or in property, cannot avail himself of the objection that the contract thus fully performed by the corporation was ultra vires, or not within its chartered privileges or power. It would be contrary to the first principles of equity to allow such a defence to prevail in an action by the corporation. It is now very well settled that a corporation cannot avail itself of the defence of ultra vires where the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds e converso. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract

and performance were not within the legitimate power of the corporation.”

These propositions are supported by the numerous authorities cited by the learned judge, and meet our full approval.

We have thus arrived at the conclusion that, so far as the defendants are concerned, the contracts between the plaintiff and the several railroad corporations must be treated as valid contracts, binding upon the defendant, the Erie Ry. Co., and enforceable against the receiver of such corporation, so far as he has assumed their obligations, acting within the authority of the order creating such receivership.

Other material questions in this case are to be solved by an examination of the principles which govern courts in the distribution of a fund, accumulated in the hands of a receiver, acting under the orders of the court. Inasmuch as the fund and the parties to the proceeding are always within the jurisdiction of the court, such distribution is usually summarily ordered upon the application of the parties interested, by a rule directing the manner thereof. Courts, in such cases, have jurisdiction, whenever possessed of the necessary facts, to make an order for either partial or total disbursement of such fund among the persons who appear to be equitably entitled thereto.

It can make no difference in the principles which should govern such distribution as to whether the facts upon which it is based appear to the court by affidavit and upon a motion, or through the medium of evidence and findings of the court upon a trial of an action between the parties interested.

The form of the proceedings cannot affect the ultimate rights of the parties. The defendant receiver has accumulated a fund from the use of the property of the insolvent railroad corporation, operated by him, which is subject to disbursement under the order appointing him such receiver, and the general rules of law applicable to trusts such as that which he was appointed to administer.

The order appointing him receiver was originally made on the 25th day of May, 1875, in an action in the Supreme Court, brought in the name of the People by their attorney-general, under the statutes regulating the jurisdiction of courts of equity over the estates of insolvent corporations, against the Erie Ry. Co., and the several mortgagees of the property of such road, and all others interested therein, for the purpose of dissolving such corporation and distributing its assets among its creditors.

A supplementary order in such action conferring additional power upon the receiver was made by the same court on the 29th day of May, 1875. By such orders, it appeared among other things, that the receiver was authorized to take immediate possession of all of the property, and exercise the functions, of the said Erie Ry. Co.,

and continue the operation of the road in the ordinary and usual course, as the same was then operated, and to purchase and pay for all such needful material and supplies as might seem to him to be necessary and proper, and to do whatever might be needful to maintain and preserve the corporate organization and franchises of the company until final judgment in the action, and to defray the necessary and proper expenses incident thereto. He was further authorized, in the exercise of a sound discretion, to pay any rent then due or that might thereafter become due under any lease then held by the Erie Ry. Co., in manner and form as provided by such leases respectively; and in order to prevent a forfeiture of any leases, he was authorized to borrow money for the payment of such rent, and issue the usual receiver's certificates therefor. It was also provided, that the order should not be so construed as to require the receiver to adopt and confirm such leases as he should find to be disadvantageous to all parties.

It appeared by the complaint and affidavits upon which such order was issued, that the Erie and Genesee Valley railroad was one of nineteen other roads which were then leased, run, and operated by the Erie Ry. Co., and that the annual rental of such road was there described as being \$8400.

By a friendly and apparently auxiliary action commenced by the Farmers' Loan and Trust Co. in the Supreme Court, as trustees under the fifth mortgage upon the property of the insolvent railroad, to foreclose the same against the Erie Ry. Co., and J. C. Bancroft Davis and James Brown, trustees under prior mortgages, the receiver, Hugh J. Jewett, by an order made in such action on the 15th day of June, 1875, had his authority, as such receiver, extended to cover the interest of the Farmers' Loan and Trust Co. under two certain mortgages held by it against the Erie Ry. Co., and was further empowered, among other things, to run and operate the roads and lines of the Erie Ry. Co., or by it possessed at the date of his receivership, and collect the tolls, income and profits of the same, and to adjust and pay taxes, assessments, charges, rent, and other expenses in and about the proper operation of said roads, but not to divert the income of the mortgaged premises for the benefit of any junior claimant.

On the same day, in a similar action in the Supreme Court, brought by J. C. Bancroft Davis and James Brown, as trustees, under the certain prior mortgages above referred to, and to foreclose the same against the Erie Ry. Co. and the Farmers' Loan and Trust Co., a further order extending the power and authority of Jewett, as receiver, was made, which, in all of its material provisions, was similar to that made in the action of the Farmers' Loan and Trust Co. above described.

One of the principal objects contemplated by these orders was to enable the receiver to continue the operation of the road and

its dependencies, and to prevent any interruption of its business, which would materially impair the value of the road and the security of its mortgagees and creditors.

Invested with these powers the defendant Jewett, on the 25th day of May, 1875, took possession, not only of the property and effects of the Erie Ry. Co., but also of the Erie and Genesee Valley railroad and all of its property and appurtenances, and continued to hold possession, and operate it in connection with the other lines belonging to the Erie Ry. Co., until they were sold under the decree of foreclosure entered in the action instituted by the Farmers' Loan and Trust Co., in the spring or summer of 1878, at which time the possession of the property by the receiver terminated.

In view of the fact that the Erie and Genesee Valley railroad was named in the papers upon which such order was based as one of the leased roads, and its rental was described as being \$8400 annually, no question can arise as to the meaning and construction of the order, or as to the contemplation of the occupation of that road, and the payment of that sum as the rental thereof.

The receiver having been appointed in an action wherein all of the mortgagees and lien holders of the property of the Erie Ry. Co. were parties defendant, by orders which have not been modified or appealed from and in which all parties have acquiesced, they cannot now be allowed to dispute or question the power conferred upon him by such orders. The court had full power and authority, by virtue of the statutes, and under its jurisdiction as a court of equity, exercising its power over the estate of an insolvent corporation, to direct the manner in which the property of such corporation should be managed and conducted while in the possession of the receiver, and the conditions upon which such funds should be paid out.

It would seem to be entirely immaterial as to the source whence the funds in the hands of the receiver were derived or whether the particular portion of such road covered by mortgages contributed more largely to such fund than other portions not subject to such liens. Under the orders in question the receipts, from whatever source derived, were to form one common fund applicable in the first instance to the discharge of the obligations which the receiver was thereby authorized to incur.

Whatever might be the respective rights of the various parties to this action as between themselves to priority in the participation of the assets of the insolvent Erie Ry. Co., such rights could affect only the property remaining after the liabilities created under the receivership had been fully paid and satisfied. Under the orders referred to it was not only within the power of the receiver to assume the obligations of the several leases referred to, so far as the payment of rent either due or to grow due thereon was con-

cerned, and discharge the same with any funds in his hands, but he was further authorized to bind even the corpus of the estate without regard to the rights of the several mortgagees therein in exercising the authority conferred upon him. *Miltenberger v. Logansport R. R. Co.*, 106 U. S. 286; s. c., 12 Am. & Eng. R. R. Cas. 464; *Langdon v. Vt. Cent. R. R. Co.*, 50 Vt. 500; 53 id. 230; 54 id. 503; s. c., 4 Am. & Eng. R. R. Cas. 33; 11 id. 688.

The receiver was not only thus authorized to assume the obligations of the lease and bind the estate in his hands to the payment of the rent accruing thereon, but by entering into the possession of and occupying such leased property he manifested by an unequivocal act his election to regard the continuance of such lease as beneficial for all of the parties interested, and his intention to continue the interest acquired by the Erie Ry. Co. under such lease. He could not take possession of the property and enjoy its use and occupation without incurring a liability for the payment of the rent under the lease by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised.

While it was competent for him at any time to negotiate a new and secure a modification of the terms of the lease with the consent of the various parties interested, or to repudiate the lease and surrender the property, yet not having done so he must be held to have continued his acceptance under the terms and conditions of the existing lease as to the payment of rent thereon.

His position has been said to be analogous to that of an executor who takes possession and enjoys the occupation of property held under a lease by his testator. He thereby becomes liable for the payment of the rent accruing during his occupation of the premises according to the terms of the lease under which it was acquired. *Martin v. Black*, 9 Paige, 641. The assignee of a bankrupt also occupies an analogous position and is subject to a similar liability.

While we regard these considerations decisive of the receiver's liability, we have not failed to notice the argument of the respondent as to the equities of the parties founded upon the assumed inability of the leased road to earn the amount of the rent secured by its lease.

If the lease in question was an unprofitable one for the receiver to continue, it was optional with him at any time to terminate it by a surrender of the demised premises and thus avoid liability thereunder.

It seems to us, however, that it does not necessarily follow that

the value of any specified portion of an extensive railway system can be measured with exactness by the amount of the receipts of such particular portion. Its value as a feeder or connecting link in such a system may be largely disproportioned to the actual sum received for transportation over it. Such considerations, influential as they might be in affecting the action of parties in negotiating a contract for the use of a railroad, would preclude a court from holding that the actual receipts of a road thus situated constituted an equitable basis for fixing the compensation to be paid for its use.

If the plaintiff in a proceeding of this kind should be held to the principles upon which courts of equity sustain actions to compel the specific performance of contracts, we think, within the authorities, he has entitled himself to the relief sought.

The principle upon which such jurisdiction is based is defined generally, to be those cases where there is the breach of a contract which was binding in law, but the remedy at law is inadequate. 3 Parsons on Contracts, 352.

It is quite obvious that this is a case within the rule.

The plaintiff by his covenants with the Erie & Genessee Valley R. R. Co. has not only subjected himself to an action on behalf of such company to compel him to pay the interest upon its bonds, but he has also become thereby liable to a similar action on behalf of each of the bondholders secured by the mortgage of this road. He has thus subjected himself to numerous actions and has been put into the possession of the property from which the means for the payment of these claims was expected to be derived. In consideration of the transfers to it by the plaintiff of the same property, the Erie Ry. Co. expressly covenanted to assume the payment of such interest and to relieve the plaintiff from his liability therefor. The defendant has placed in the hands of the plaintiff the property which was the consideration of, and inducement for, such promises. Although the plaintiff, upon the payment of such interest, may be entitled to recover it back from the Erie Ry. Co. in an action at law, he is under no equitable obligation to pursue such a course. It furnishes a good equitable reason for not requiring such a proceeding in this case that it would necessitate the raising by him in each year of a large amount of money, which would certainly be difficult, and might be impossible, without the aid of the property which was the consideration of his promise to make such payment. Under such circumstances it would seem to be grossly inequitable to throw upon him the burden of carrying those obligations, while the party ultimately liable for their payment retains the property and unjustly repudiates the obligation by which it was acquired. It is perfectly apparent that if the plaintiff were confined to his remedy at law, that the damages to which he would thereby be entitled, would be quite inadequate to

compensate him for the loss which he might and probably would sustain.

Although the plaintiff by virtue of his covenant with the Erie & Genessee Valley R. R. Co. was originally primarily liable to pay such interest, yet through his contract with the Erie Ry. Co., he, so far as the latter was concerned, has become a mere surety for the payment of the debt, and has the right to call upon it to indemnify and protect him from his collateral liability. A surety who has placed the means for paying a debt into the hands of another, under a covenant to pay the same, can maintain an action in equity to compel the performance of such covenant without first paying the debt, and is not limited to his action on such covenant.

The principles decided in *Marsh v. Pike*, 10 Paige, 595, seem to be fairly applicable to this case. In that case a mortgagor who had sold and conveyed the land covered by the mortgage, subject to the same, and the payment thereof had been assumed by successive grantees thereafter, was held to be entitled to maintain his action against such subsequent grantees to compel them to pay off and discharge such mortgage. It was held that he was under no legal obligation to pay the mortgage and enforce his claim under the right of subrogation, but that he could file his bill directly and compel the specific performance by his grantees of the covenant to pay. Similar in principle are the cases which hold that the subscriber for stock in an incorporated company upon a sale thereof and the covenant of his vendee to pay and discharge the liability of such subscriber to the corporation, may maintain his action to compel such vendee to perform his contract. *Cheale v. Kenward*, 60 Eng. Ch. 27; *Tod v. Taft*, 7 Allen, 371; *Leach v. Fobes*, 11 id. 506.

The other questions raised and argued in this case are necessarily involved in and determined by the conclusions arrived at in the foregoing opinion.

We are, therefore, on the whole case, of the opinion that the general term erred, and that the order for a new trial should be reversed, and the judgment of the special term affirmed.

All concur.

Order reversed and judgment affirmed.

Lease.—A railroad company has no power, without express legislative authority, to lease its road and franchises to another company. *Kean v. Johnson*, 1 Stockt. 401; *Black v. Del. & Rar. Canal Co.*, 7 C. E. Gr. 130; 9 C. E. Gr. 455; *Troy R. R. Co. v. Kerr*, 17 Barb. 581; *Clark v. Omaha R. R.*, 5 Neb. 314; *Johnson v. Shrewsbury R. R.*, 17 Jur. 1015; 8 De G., M. & G. 914; *McMillan v. Mich. South. R. R.*, 16 Mich. 79; *Shrewsbury R. R. v. London R. R.*, 17 Jur. 845; *Occum Co. v. Sprague Co.*, 34 Conn. 529; *Thomas v. West Jersey R. R.*, 101 U. S. 71; *East Anglian R. R. v. Eastern Co. R. R.*, 11 C. B. 775; *Campbell v. Marietta R. R.*, 23 Ohio St. 168; *Lauman v. Lebanon Valley R. R.*, 30 Pa. St. 42; *Pinto Co. Case*, L. R. (8 Ch. Div.) 268;

Boston R. R. v. New York R. R. (R. L.), 23 Alb. L. J. 518; Campbell's Case, L. R. (9 Ch. App.) 1; Simpson v. Westminster Co., 8 H. L. Cas. 712; Era Ins. Co., 6 Jur. (N. S.) 1834; Smith v. St. Louis Ins. Co., 2 Tenn. Ch. 727; Price v. St. Louis Ins. Co., 3 Mo. App. 262; Cozart v. Georgia R. R., 54 Ga. 879; Abbott v. J. G. & K. H. R. Co., 2 Am. & Eng. R. R. Cas. 541; Boston & P. R. R. Co. v. N. Y. & N. E. R. R. Co., 2 Am. & Eng. R. R. Cas. 800; Troy & Boston R. Co. v. Boston, H. T. & W. R. Co., 7 Am. & Eng. R. R. Cas. 49.

STEWART et al.

v.

HOYT'S EXECUTORS.

(111 *United States Reports*, 373.)

By a lease from one railroad corporation of its railroad to another railroad corporation, subject to a previous mortgage, the lessee covenanted to pay as rent a certain proportion of the gross earnings, and to state accounts semi-annually, and further covenanted, if the rent for any six months should be insufficient to pay the interest due at the end of the six months on the mortgage bonds, then to advance a sufficient sum to take up, and to take up the balance of the coupons for such interest; and it was agreed that for all sums so advanced the lessee should have a lien before all other liens except the mortgage. Eighteen months later, after the lessee had accordingly paid and taken up some coupons, and had declined to take up others, on account of the refusal of the lessor to accept in payment of rent coupons so taken up, the two corporations executed a supplemental agreement, by which, in lieu of the rent reserved in the lease, and of all advances of money to take up coupons, the lessee covenanted to pay, and the lessor to accept, as rent, a larger proportion of the gross earnings, "all accounts being settled exactly, and all liabilities and obligations between the two companies being adjusted and discharged by and upon the semi-annual statements provided in said lease;" the lessor released the lessee from any obligation to make future advances of money to take up coupons, and from liability for any previous neglect to make such advances, and from any obligation to pay money in the nature of rent and advances, except the proportion of the gross earnings stipulated in the supplemental agreement; and all the provisions of the lease, except as so modified, were ratified and confirmed, and "all causes of action for breach of any agreement therein contained," which had arisen since its execution, were mutually waived and released. The lessee afterwards paid rent computed according to the supplemental agreement. *Held*, that any claim of the lessee against the lessor, or against the mortgaged property, for money paid to take up coupons, was released and discharged.

THIS was an appeal from a decree dismissing a petition of the trustees of the Wisconsin Central R. R. Co. to be allowed, out of the proceeds of a sale of the railroad property and franchises of the Milwaukee & Northern Ry. Co., under the foreclosure of a mortgage thereof to trustees (of the survivor of whom the appel-

lees are executors), the sum of \$5961.75 paid by the petitioners to take up coupons originally attached to the bonds secured by that mortgage.

The facts material to the understanding of the question of law decided by this court were as follows :

By indenture of November 8, 1873, the Milwaukee & Northern Ry. Co. leased its railroad and all its property and franchises to the Wisconsin Central R. R. Co. for nine hundred and ninety-nine years :

“Yielding and paying rent therefor as follows, to wit: In and for each year of said term wherein the gross earnings received from the demised premises as hereinafter set forth shall exceed the sum of one million dollars, thirty per cent of said gross earnings; and in and for each year of said term wherein said gross earnings shall exceed eight hundred thousand dollars, but not exceed one million dollars, thirty-three per cent of said gross earnings; and in and for each year of said term wherein said gross earnings shall be less than eight hundred thousand dollars, thirty-five per cent of said gross earnings.”

The rent was payable in monthly instalments, upon accounts as nearly exact as practicable, stated monthly, of the gross earnings for the month next but one preceding, to a trustee selected by the parties jointly, upon trust to keep the sum paid until the next instalment of interest was due upon the mortgage bonds, and then to apply it, or so much of it as necessary, to the payment of that interest; and if any surplus remained, to pay it to the lessor, unless due to the lessee “for advances, as is hereinafter provided, made to or for the benefit of the lessor to pay such interest;” and if such surplus, or any part thereof, was so due, then to pay to the lessee, as afterwards provided, so much as was due for advances and interest. The lessee was also to state semi-annual accounts of the gross earnings, upon which all accounts between the parties were to be balanced. The lease contained, among other covenants, the following :

“Eighth. The second party also covenants to pay the rent hereinbefore reserved when and as payable; and also covenants, if the rent, paid to the trustee aforesaid, in any six months previous to the payment of interest on the said first-mortgage bonds, is not enough to pay the whole interest then maturing, to advance so much money as may be necessary to take up the balance of the coupons for interest as they become due and payable, and to take them up; and it is expressly agreed between the parties to these presents that for all sums so advanced the second party shall hold said coupons as a lien, and the same is hereby made and constituted a lien on the rent hereby reserved on all the property hereby demised and leased, prior to and superior to all other liens except said mortgage, until the same be fully reimbursed, with interest at

eight per centum per annum, out of the said rent or otherwise by the first party. It is also agreed that any surplus of rent, which appears upon the semi-annual adjustments of accounts, shall be paid to the second party, so far as may be needed to cover any advances and interest thereon made to protect the coupons aforesaid, and that only the residue of said surplus, if any, shall be paid to the first party."

The rent which accrued in the six months next before June 1, 1874, falling short of paying the interest payable on that day on the coupons, the lessee paid and took up coupons to the amount of the deficiency, and the lessor received some of these coupons in payment of the rent. The lessor afterwards refused to receive coupons in payment of rent; and on December 1, 1874, the lessee, which had not meanwhile paid any rent, refused to advance money to take up the coupons. The two corporations, after other disputes had arisen between them, executed, on June 1, 1875, a supplemental indenture containing the following provisions:

"First. In lieu of the rent reserved in the lease, and of all advances of money to take up the interest coupons of the Milwaukee & Northern Ry. Co., as provided in said lease, the Wisconsin Central R. R. Co. shall pay, and the Milwaukee & Northern Ry. Co. shall accept, for and during the space of three years from and after the first day of June, 1875, the amount of forty per cent of the gross earnings received from the demised premises; and after the expiration of said three years and during the remainder of the term, the rent shall be paid as reserved in said lease, if the rent so reserved is sufficient to pay said coupons; but if not sufficient to pay said coupons, then the Wisconsin Central R. R. Co. shall pay, and the Milwaukee & Northern Ry. Co. shall accept, in full satisfaction of rent for the demised premises, such part of said gross earnings, not exceeding in any event forty per cent thereof, as shall be sufficient to pay said coupons; all accounts being settled exactly, and all liabilities and obligations between the two companies being adjusted and discharged by and upon the semi-annual statements provided in said lease, and on the thirty-first day of May and the thirtieth day of November in each year, and said semi-annual statements being accepted by each company as final adjustments of all claims for rent of the demised premises to the respective date thereof."

"Fourth. The Milwaukee & Northern Ry. Co., in consideration of the increased rental and agreements aforesaid on the part of the Wisconsin Central R. R. Co., hereby releases the Wisconsin Central R. R. Co. from any and all obligations to hereafter make any advances of money to take up the interest coupons of the Milwaukee & Northern Ry. Co., as stipulated in said lease; and also from any and every obligation and liability arising out of any previous neglect to make said advances hitherto due and payable under

terms of said lease; and also from any and every obligation to pay any money under said lease and any provision thereof, in the nature of rent and advances to or for the benefit of the Milwaukee & Northern Ry. Co., except the proportion of gross earnings (not exceeding in any event forty per cent thereof), which is herein agreed, when and as the same is payable under the terms of this agreement and said lease."

"Sixth. All the provisions of said lease, except so far as are herein expressly modified or changed, are hereby by each of said companies ratified and confirmed; and all causes of action for breach of any agreement therein contained, which have arisen from its date of execution until this day, are hereby mutually waived and forever released by and between said companies."

The lessee paid rent computed according to the supplementary agreement from its date until September, 1875. On January 2, 1879, the lessee assigned to the petitioners, in trust to pay debts to its employees, and expenses of running its railroad, all sums of money on hand or to be received, and all accounts receivable of every nature, for or on account of earnings and income of either railroad; and delivered to the petitioners the coupons taken up as aforesaid, of which the sum claimed in their petition had not been reimbursed to them.

J. Hubley Ashton and Edwin H. Abbot for appellants.

E. Mariner for appellee.

GRAY, J., stated the facts in the foregoing language, and continued:

The petitioners contend that for the sum paid to take up coupons in accordance with the provisions of the lease of November 8, 1873, they have a claim against the lessor, and a lien upon the proceeds of the sale of the mortgaged property, equal to those which the original owners of those coupons had.

But this court concurs in opinion with the Circuit Court that, if the lessee ever had such a claim and lien, they were released by the supplemental agreement of June 1, 1875, and the payment of rent, and the adjustment of semi-annual accounts, in accordance therewith. By this agreement, the provisions of the original lease were confirmed and ratified, "except so far as are herein expressly modified or changed;" the proportion of gross earnings to be paid as rent was increased; all accounts between the parties were to be adjusted and discharged by and upon the semi-annual statements; the lessor released the lessee from all obligation to make future advances, and from all liability for past neglect to make advances, to take up coupons; and each party released the other from all causes of action which had arisen for breach of any agreement in the original lease. Any obligation of the lessor to reimburse to the lessee money paid by the latter to take up coupons,

arose under an agreement in the original lease and was one of the obligations adjusted and discharged by and upon the semi-annual statements. The intention of the supplemental agreement, as appears upon its face, was to adjust all existing controversies between the parties, by agreeing to pay and receive an increased rate of rent, and by mutually releasing all existing obligations and liabilities, including, on the one side, the lessee's obligation to take up coupons in the future, and its liability for neglect to take them up in the past, and, on the other side, the lessor's obligation and liability to the lessee by reason of coupons already taken up by the latter. The parol evidence introduced by the petitioners at the hearing, if competent in law, was quite insufficient in fact to control or vary the meaning of the written instrument.

Decree affirmed.

BRANSON et al.

v.

OREGONIAN Ry. Co. (Limited).

(Advance Case, Oregon. January 14, 1884.)

Property purchased from a private railroad corporation in good faith and for an adequate consideration is not subject to a trust in the hands of a purchaser, for the satisfaction of unpaid debts of the corporation, although the purchaser had notice of such debts at the time of the purchase. And the rule is the same whether the purchase includes all the property of the corporation or only a part of it.

A written instrument, purporting to be an agreement between parties, but understood and intended to be a mere form, and never delivered to take effect as an actual agreement, is of no force as between such parties, and parol evidence is admissible to prove such facts.

The power of the circuit court over amendments to pleadings, after a remand from the supreme court, is not affected by the circumstance of an appeal having been taken; and while the supreme court may send a case back for amendment of pleadings and re-trial generally, it has no power to prescribe the character of the amendments to be allowed, or the mode of conducting subsequent proceedings.

APPEAL from Circuit Court of Yam Hill.

The plaintiffs in the lower court and respondents herein brought suits against the Oregonian Ry. Co. (Limited), the Oregon Ry. Co. (Limited), William Reid, Ellis G. Hughes, James B. Montgomery, and Joseph Gaston, and the Dayton, Sheridan & Grand Ronde Ry. Co., and the Willamette Valley R. R. Co. to enforce payment of certain obligations known in the case as freight receipts, and sought to charge the property of the Dayton, Sheridan

& Grand Ronde Ry. Co. with a trust for the payment of these obligations; also, to charge the liability on the stock. The Dayton, Sheridan & Grand Ronde Ry. Co. conveyed its property to the Willamette Valley R. R. Co. as consideration for the payment of the debts of the Dayton, Sheridan & Grand Ronde Ry. Co. The Willamette Valley R. R. Co. conveyed to the Oregon Ry. Co. (Limited) for the same consideration, and the Oregon Ry. Co. (Limited) conveyed the property to the Oregonian Ry. Co. (Limited) without consideration. Joseph Gaston subscribed for \$100,000 of the stock in the Dayton, Sheridan & Grand Ronde Ry. Co., and \$500,000 in the Willamette Valley R. R. Co. and subsequently assigned to E. G. Hughes, as set out in the opinion. The case was heard and determined in the circuit court, and went to the supreme court on appeal, when the Oregonian Ry. Co. appeared by new counsel and charged bad faith on its attorney and asked his removal; and also that William Reid and Ellis G. Hughes had acted in bad faith as their agents, and to such an extent as to make them liable in the case without recourse; and, further, that if their case was properly presented there would be no liability on it; and moved to remand the same to the court below. The defendants Hughes and Reid, and the Oregon Ry. Co. (Limited), made no objection thereto. The supreme court accordingly remanded the cause to amend pleadings and take further proofs upon and touching the question of bad faith on the part of William Reid and E. G. Hughes. There was set up an agreement between William Lowson and P. M. Cochrane and the Oregon Ry. Co. (Limited), whereby the Oregon Ry. Co. (Limited) agreed to convey the property and stock, free of debts. The Oregon Ry. Co. (Limited) claimed the agreement was a new form. The case came before the supreme court again on the appeal of the Oregonian Ry. Co. (Limited) as against the plaintiffs below and all its co-defendants. The issue was mainly upon the charges made by the Oregonian Ry. Co. (Limited) as against its co-defendants, William Reid, E. G. Hughes, and the Oregon Ry. Co. (Limited).

J. K. Kelly for respondents, B. B. Branson and others, plaintiffs below.

C. J. MacDougall and J. M. Bower for William Reid and Oregon Ry. Co. (Limited).

C. B. Bellinger and Geo. H. Williams for Hughes.

H. T. Bingham for Montgomery.

W. H. Effinger and Jonathan Bourne, Jr., also Edmund Robertson (by special leave) for the Oregonian Ry. Co. (Limited), appellant.

Joseph Gaston in propria persona.

WATSON, C. J.—The decision heretofore rendered in this case

leaves but few questions for determination at the present time. Those still open to investigation will now be examined briefly:

The power of the circuit court to allow amendments to the pleadings after the remand of the cause was the same as it was before the appeal was taken. The remand was ordered that the lower court might examine this power, and this court had no authority to prescribe the character of the amendments or the terms of their allowance. And we think this view is in full accord with a fair construction of the language employed in the opinion upon the subject of the remand.

But conceding the power of the lower court to permit the amendment to the complaint which the appellant objects to, still the respondents (plaintiffs below) can have no relief on the new cause of suit thus introduced. It is doubtful if the allegations show any cause of suit, but if they do the proof wholly failed to establish one. The theory upon which the complaint appears to have been framed, and the proofs introduced in respect of this cause of suit, seems to be that all the debts of a private corporation are equitable liens upon its property, which are not discharged by a purchase in good faith and for an adequate consideration, even if made with notice of unpaid debts.

The position taken by the respondents is thus stated by their learned counsel in his supplemental brief: "No act of the grantor or grantee of this corporation property, no matter what, can set aside this trust imposed by the law short of the actual payment of the debt." According to this doctrine the debt of a private corporation is a specific lien on every portion of its property, and a purchaser with notice cannot get a good title while such debt remains unpaid. It is true, such corporation holds its property in trust for its creditors and stockholders. *Field Corp.* § 143; *Chicago, etc., R. R. v. Howard*, 7 Wall. 392. But this is perfectly consistent with the power to sell any portion or all of its property for an adequate consideration, free from the incumbrances of its debts, the price received for the property taking its place as the trust fund. *Powell v. North Missouri R. Co.*, 42 Mo. 63; *Hill v. Fogg*, 41 Mo. 563. As the case made by the pleadings and proofs in this instance shows no bad faith nor want of adequate consideration paid for the property purchased by the appellant from the Willamette Valley R. R. Co. we hold that the property in the hands of the purchaser is not subject to any trust for the satisfaction of the unpaid debts of its grantor, although chargeable with notice of them at the time of the purchase.

The evidence shows that Joseph Gaston subscribed for 1000 shares of the capital stock of the Dayton, Sheridan & Grand Ronde Ry. of the par value of \$100 per share, and also subscribed for 5000 shares of the capital stock of the Willamette Valley R. R. Co. of the par value of \$100 per share; all of which he after-

wards assigned to Ellis G. Hughes to hold in trust for any person or corporation who or which might become a purchaser of the property and stock of such corporation upon the terms specified in such assignment. Said stock is unpaid stock, and the legal title thereto is still in Hughes. After the assignment, and on or about the fourth day of February, 1880, William Lowson, Peter Moir Cochrane, and other parties residing in Scotland contemplating the incorporation of the appellant, and on its behalf, agreed to take said property and stock, and furnish the money used in its purchase prior to the incorporation of the appellant. As a means of carrying out the scheme and advancing the interests of the appellant, the Oregon Ry. Co. (Limited) was incorporated and organized under the laws of Oregon. The property purchased—except the stock—was conveyed to and temporarily vested in this corporation until the appellant should be fully incorporated and organized, and ready to receive title to the same. On the eleventh day of December, 1880, the property was formally conveyed to the appellant, which was all the time the real owner.

We have already decided that the indebtedness of the Dayton, Sheridan & Grand Ronde Ry. Co., which forms the basis of this suit, is chargeable to the holders of the legal title to such unpaid stock. See opinion, 10 Or. 278. In addition to the authorities there cited, to the effect that the remedy of the creditors of the corporation is against the holders of the legal and not equitable title, we refer to the following: *Worrall v. Judson*, 5 Barb. 210; *In re Empire City Bank*, 18 N. Y. 199; *Burr v. Wilcox*, 6 Bosw. 198; s.c., 22 N. Y. 551; *Richardson v. Abendroth*, 43 Barb. 162; *Crease v. Babcock*, 10 Metc. 525; *Grew v. Bred*, Id. 569; *Holyoke Bank v. Burnham*, 11 Cush. 183. Gaston and Hughes are therefore both liable to the respondents in this suit by reason of having held the legal title to such stock. But Hughes, as last holder, stands first in the order of liability.

But the acts of the promoters of the appellant in making this purchase on its behalf are seen to have been fully ratified by it after its incorporation. These acts are therefore to be treated as its own, and place Hughes in the position of an agent or trustee in taking and holding the legal title to the unpaid stock. Such being the relation of these parties, as we declared in our former opinion, the appellant must save Hughes from loss or damage on account of his liability on such unpaid stock, unless it can show some abuse of authority or misconduct on his part justifying its release from such obligation. *Story, Ag. § 339*; *Powell v. Trustees of Newburgh*, 19 Johns. 284; *Ewell, Ag. 353*; *Moore v. Appleton*, 26 Ala. 633; *Coventry v. Barton*, 17 Johns. 142; *Avery v. Halsey*, 14 Pick. 174; *Drummond v. Humphreys*, 39 Mo. 347. It does not appear from the evidence that Hughes was the agent of the promoters of the appellant, or so considered by any of the parties in making the pur-

chase. He seems to have been anxious to see the purchase effected, and exerted himself to secure a favorable consideration of the scheme by the appellant's promoters in Scotland beyond all question. He may have anticipated some benefit to himself ultimately as a possible consequence of its adoption by them. But at that time he was a mere volunteer, not entitled to the compensation nor subject to the responsibilities of an agent. He may have erred in respect to the "freight scrip" debts being an incumbrance upon the property whose purchase he advocated. But there is nothing to show that the opinion he expressed on this subject was not honestly entertained. We do not think it can be even plausibly maintained, upon the evidence in the case, that Hughes acted in bad faith in this transaction towards the appellant or its promoters; and it certainly is not sufficient to justify the appellant's release from its obligation to indemnify him against loss through a transaction in which he was its agent or trustee, that in respect to some other matter, where no such relation existed, he may have volunteered an erroneous though honestly entertained opinion, by following which appellant has been misled and has suffered injury. We think the appellant should be compelled to indemnify him against such loss, and that it may properly be required to do so in this suit, as we have already held. See opinion in 10 Or. 278; also, Story, Eq. Pl. § 72 et seq.; 1 Daniell, Ch. Pl. & Pr. (4th ed.) 281 et seq.; *Greenwood v. Atkinson*, 5 Sim. 419; *Camp v. McGillicuddy*, 10 Iowa, 201; *Williams v. Bankhead*, 19 Wall. 563.

The appellant's claim to be itself indemnified by William Reid and the Oregon Ry. Co. (Limited) seems to us equally devoid of equity. Reid also was a volunteer, although, like Hughes, he doubtless expected to be benefited indirectly by the consummation of the scheme. There is no ground, however, in the evidence for imputing to Reid either neglect of the interests of the appellant and its promoters, or any sort of misconduct or bad faith, throughout the entire transaction; and the Oregon Ry. Co. (Limited), as we have seen, was a mere instrumentality in the hands of the appellant's promoters and friends for effecting the purchase and transfer of the property. A strenuous effort has been made to hold this corporation to the position of seller of the property to the appellant, assumed in a certain writing purporting to be an agreement between it and two of the appellant's promoters, Lawson and Cochrane, signed by the former on March 4, 1880, and by the two promoters some time afterwards. It was not such seller in fact, and all the parties concerned knew it was not. The evidence fully satisfies us that this instrument never was intended or understood by any of the parties concerned to be an actual agreement, but was, in fact, a mere form, to appear in the prospectus of the proposed corporation which the promoters were required by the law of Scotland to publish. If

we have drawn a correct conclusion from the evidence upon this point, then such written instrument never acquired the force of a binding agreement between the parties, and neither can predicate any rights upon it as against the other in this suit. Parol evidence to establish a state of facts showing that a written instrument, purporting to be an agreement, has not gone into effect, and is therefore no agreement, is clearly competent.

We are satisfied the decree of the circuit court upon the merits is correct, and it is therefore affirmed.

AMES v. KANSAS ex rel. JOHNSTON, Attorney-General.

KANSAS PACIFIC RY. CO. v. KANSAS ex rel. JOHNSTON, Attorney-General.

(111 *United States Reports*, 449.)

The remedy by information in the nature of quo warranto, though criminal in form, is in effect a civil proceeding.

A statute abolishing the common-law proceeding by information in the nature of quo warranto, and authorizing an action to be brought in cases in which that remedy was applicable, makes the proceeding a civil action for the enforcement of a civil right, subject to removal from State courts to the courts of the United States when other circumstances permit.

Proceedings by a State against a corporation created under its own laws, in the nature of quo warranto for the abandonment, relinquishment and surrender of its powers to another corporation with which it has been consolidated under a law of the United States, and proceedings against the directors of said consolidated company for usurping the powers of such State corporation are, when in the form of civil actions, suits arising under the laws of the United States within the meaning of the acts regulating the removal of causes.

When a suit brought by a State in one of its own courts against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, presents a case arising under the laws of the United States, it may be removed to the Circuit Court of the United States if the other jurisdictional conditions exist.

In view of the practical construction put upon the Constitution by Congress and the courts in the statutes and decisions cited in the opinion, the court is unwilling to say that it is not within the power of Congress to grant to inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction.

The judiciary act of March 3, 1875, 18 Stat. 470, does not confer upon Circuit Courts jurisdiction over causes in which the jurisdiction of the Supreme Court is made exclusive by § 687 Rev. Stat.

Suits cognizable in the courts of the United States on account of the nature of the controversy, and which are not required to be brought originally in the Supreme Court, may be brought in or removed to the Circuit Courts from State courts without regard to the character of the parties. The reasoning and language in *Cohens v. Virginia*, 6 Wheat. 397, concerning

appellate jurisdiction of the Supreme Court, adopted and applied to the jurisdiction of Circuit Courts over causes in which a State is a party, commenced in a State court and removed to a Circuit Court.

EACH of these writs of error brought up for review an order of the Circuit Court remanding a case to the State court from which it had been removed, and the two cases were considered together. The material facts were these :

The Leavenworth, Pawnee and Western R. R. Co. was incorporated by the Legislature of the Territory of Kansas in 1855, to build a railroad from the west bank of the Missouri River, in the town of Leavenworth, to or near Fort Riley, and from thence to the western boundary of the Territory, which was the east boundary of Utah on the summit of the Rocky Mountains. 10 Stat. 283, c. 59, sec. 19. In 1857 this act was amended so as to authorize the construction of a branch from some favorable point on the main line to some point on the southern boundary of the Territory, where an easy connection could be made with a line of road extending to the Gulf of Mexico, and also of a branch to the northern boundary of the Territory. The company was organized under these acts in 1857, and before January 1, 1862, had located its line from Leavenworth to Fort Riley, and had, to a large extent, secured its right of way and depot grounds.

On the 1st of July, 1862, the first Pacific Railroad Act was passed by Congress, incorporating the Union Pacific R. R. Co., and providing for government aid in the construction of the several roads brought into the system, which was then inaugurated to establish a railroad connection between the Atlantic and Pacific coasts. 12 Stat. 489, c. 120. By sec. 9 of this act the Leavenworth, Pawnee and Western R. R. Co. of Kansas was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific R. R. of Missouri, to the point in the Territory of Nebraska, then established as the eastern terminus of the Union Pacific road. Provision was made for government aid to this company in all respects like that to the Union Pacific. Sec. 16 is as follows :

“That any time after the passage of this act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company ; notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act.”

The Leavenworth, Pawnee and Western Co. accepted the provisions of this act, and was thereafter designated as the Union Pacific R. R. Co., Eastern Division. By the act of July 2, 1864,

c. 216, secs 12, 13, Stat. 361, the company was required to build its railroad from the mouth of the Kansas by way of Leavenworth, or, if that was not deemed the best route, to build a branch from Leavenworth to the main stem at or near Lawrence. This act also made provision, by sec. 16, for the consolidation of any two or more corporations embraced in the system, upon such terms and conditions as they might agree upon not incompatible with the laws of the States in which the roads of the companies might be. On the 3d of July, 1866, c. 169, 14 Stat. 80, the company was permitted to make its connection with the Union Pacific at any point not more than fifty miles westerly from the meridian of Denver. By another act passed March 3, 1869, c. 324, 15 Stat. 324, the company was authorized to extend its road to Denver, in the Territory of Colorado, and from there to make its connection with the Union Pacific at Cheyenne, over the road of the Denver Pacific Ry. and Telegraph Co., a Colorado corporation, power being given to contract with the last named company for that purpose. On the same day a joint resolution was passed by Congress, No. 23, 15 Stat. 348, authorizing the Union Pacific R. R. Co., Eastern Division, by a resolution of its directors, filed in the office of the Secretary of the Interior, to change its name to the Kansas Pacific Ry. Co.

Under this authority the road was built from its junction with the Missouri Pacific R. R. in Kansas City, Missouri, through Fort Riley, in Kansas, to Denver, in Colorado, and government aid was furnished it under the acts of Congress. From Denver it formed its connection with the Union Pacific road at Cheyenne, over the road of the Denver Pacific Co. It also built a branch from Leavenworth to Lawrence, but the road from Fort Riley to the original eastern terminus of the Union Pacific was never constructed.

On the 24th of January, 1880, the Union Pacific R. R. Co., the Kansas Pacific Ry. Co., and the Denver Pacific Ry. and Telegraph Co., acting under the authority of sec. 16 of the Pacific Railroad Act of July 1, 1862, and sec. 16 of the act of July 2, 1864, entered into an agreement for the consolidation of the three corporations into one, by the name of the Union Pacific Ry. Co., and from that time the road of the Kansas Pacific Co., including that portion which lies in Kansas, has been operated and managed as the Kansas Division of the Union Pacific Ry. Co.

At the first session of the legislature of Kansas after this consolidation was effected, a resolution was passed directing the Attorney-General to inquire into its legality, and to report whether in his opinion the consolidated company was amenable to the laws of the State; whether the Union Pacific R. R. Co. had usurped or was exercising rights and franchises within the State not authorized by law, or had in any manner failed to comply with or had violated any of the laws of the State; whether the Kansas Pacific Co. was in law an existing corporation of the State; and whether

the State had lost jurisdiction over the property of the corporation. At the next session another resolution was passed, directing the Attorney-General to institute proper proceedings in the Supreme Court of the State, "in the nature of quo warranto, against the Kansas Pacific Ry. Co. for an abandonment, relinquishment, and surrender of its powers as a corporation to such consolidated company, and also to institute like proceedings against the consolidated company, the Union Pacific Ry. Co., for usurping, seizing, holding, possessing, and using the franchise and privileges, powers and immunities of the Kansas Pacific Ry. Co. in the State of Kansas."

Under these instructions the present suits were brought in the Supreme Court of the State. The petition against the Kansas Pacific Co. set forth the acts of the Territorial legislature of Kansas incorporating the company and extending its powers, passed in 1855 and 1857; the organization of the company under its charter; the acts of Congress, passed July 1, 1862, and July 2, 1864, granting aid to the company; and the construction of the road. It then averred:

"That on the 24th of January, 1880, the said Kansas Pacific Ry. Co. wrongfully and unlawfully attempted to consolidate its said corporation with the Union Pacific R. R. Co., a corporation chartered under the said acts of Congress of 1862 and 1864, whose line runs from the Missouri River at or near Omaha, Nebraska, to Ogden, in Utah Territory, and the Denver Pacific Ry. and Telegraph Co., whose line begins at the city of Denver, in the State of Colorado, and runs in a westward direction to a junction with the Union Pacific R. R. Co., at a place called Cheyenne, in the Territory of Wyoming. And the said Kansas Pacific Ry. Co. unlawfully and wrongfully attempted to confer upon the said consolidated company all of its franchises, immunities, liberties, and privileges granted by virtue of its charter aforesaid, and to merge the same into a pretended corporation, not created by the laws of the Territory or State of Kansas, nor owing any duty to the Territory or State of Kansas, but a pretended corporation, created, if at all, by acts of Congress, and amenable only to federal control, and subject only, as to its rights and the causes of action which might thereafter exist against it, to the jurisdiction of the federal tribunals. And the said Attorney-General gives the court further to understand and be informed, that the said Kansas Pacific Ry. Co. unlawfully and wrongfully entered into articles of consolidation with said Union Pacific R. R. Co. and the said Denver Pacific Ry. and Telegraph Co., which were expressly in violation of its charter, and in conflict with the duties and obligations owing by it to the State of Kansas under the provisions and terms of its charter aforesaid; and further, that said articles were in conflict with the laws of the State of Kansas respecting railroad corpora-

tions and the right of railroad companies to consolidate, and were not compatible with such laws."

The bill then set forth a copy of the articles of consolidation, from which it appeared that the sole and only authority relied on for the consolidation was that contained in the several acts of Congress, and that the intent of the parties was to organize the company thereby formed "under the said acts of Congress, and to make the said acts of Congress the charter or constituent acts of this company, as fully as if the same were incorporated herein at large." The contract then appointed directors of the new company, and the place for holding the annual meeting of stockholders, until otherwise ordered, was fixed at the company's office in the city of New York. The then existing by-laws of the Union Pacific R. R. Co. were also provisionally adopted and made applicable to the new company.

The bill then averred that it was the duty of the Kansas Pacific Co. to make certain reports to the Secretary of State of Kansas, which it had wholly failed to do, and that it held "its general offices and all accounts of its operations, at the general offices of said pretended consolidated company, at the city of Omaha, in the State of Nebraska, and alleges and pretends that the said corporation, the Kansas Pacific Ry. Co., no longer owes any duty under its charter as aforesaid to the State of Kansas, but that it is controlled as to its chartered obligations by the acts of Congress creating the Union Pacific R. R. Co., and by the unlawful articles of consolidation aforesaid." It then charged that the company had violated the laws of the State by failing to keep its general offices for the transaction of business within the State, and removing them to Omaha and placing "the same under the absolute order, control, and disposal of the said pretended consolidated company." Then it alleged that the road of the Kansas Pacific Co. was run as the "Union Pacific Ry. Co., Kansas Division," and managed by the new corporation; that "since the pretended consolidation as aforesaid the said Kansas Pacific Co. has wholly failed and neglected to designate some person residing in each county into which its said line of railroad runs, or in which its said business is transacted, on whom all process and notices issued by any court of record, or justices of the peace of such county, may or might be served," and that it had also failed from the same time "to file a certificate of the appointment or designation of such person in the office of the clerk of the District Court of the county in which such person resides."

The consolidation was afterwards attacked because the roads were originally competing roads, and did not connect at the State line so as to form a complete and continuous line of railway. The next allegation was that the Kansas charter was forfeited by the diversion of the road "to the use of a foreign corporation, outside

of the jurisdiction of the State of Kansas, and beyond the reach of her authorities, with the declared intent that it shall be operated, and used, and worked, not according to the laws of Kansas, made or to be made to protect the rights of her people, but under and according to the provisions of other laws, alleged to have been enacted by the legislature of another government, for the regulation of another railroad, lying in another State."

The prayer was that the

"Kansas Pacific Ry. Co. . . . be made to answer to the State of Kansas by what warrant it claims to have, use, and enjoy the liberties, privileges, and franchises aforesaid; and further, by what warrant it claims and has exercised the right to put said railroad and its appurtenances into the possession and under the control of the above mentioned foreign railroad company, and by what right it claims to maintain such foreign corporation in such possession, or in the enjoyment and exercise of the franchises and privileges bestowed by the State of Kansas exclusively on said Kansas Pacific Ry. Co.; and that . . . the said respondent company be adjudged to have forfeited all its rights, liberties, and franchises, and to be ousted from the same, and that the corporation be thereupon dissolved; and that it be further adjudged that the said franchises granted to the defendant by the State have become relinquished, abandoned, and forfeited to the State of Kansas, and that the same be resumed to the State, and that the State take possession of the said railroad, with all its appurtenances and fixtures, as public property, and make such disposition thereof as may be thought necessary to secure the rights of the State, saving the just interests of creditors and other third parties guiltless of the frauds, wrongs, and injuries herein charged against the corporation and the members thereof."

The answer of the defendant, which, for the purposes of the suit, appeared in the name of the Kansas Pacific Ry. Co., admitted the consolidation and set up the authority for that purpose under the laws of Congress. All violations of the laws of Kansas were denied, and the position was distinctly assumed that the Kansas Pacific Co. became, under the legislation of Congress, a corporation of the United States, and as such had full authority to enter into the agreement of consolidation which is complained of.

The petition against the individuals who, as was alleged, called themselves the board of directors of the Union Pacific Ry. Co., charged them with using, without warrant, charter, or grant, the liberties, privileges, and franchises of being a railroad company to use and operate the railroad of the Kansas Pacific Co., and averred that that road was built under the Kansas charter of the Leavenworth, Pawnee, and Western Co. The prayer was that they might be made

"To answer to the State by what warrant they claim to have,

use, and enjoy the liberties, privileges, and franchises aforesaid; and that upon a due hearing hereof the said defendants and said pretended railroad company be adjudged to have unlawfully and wrongfully usurped and appropriated the rights, liberties, privileges, and franchises aforesaid, and to be wrongfully and unlawfully using, enjoying, and exercising the same, and that they be ousted therefrom."

The answers of the defendants set up the legislation of Congress affecting the original Kansas corporation and the consolidation of that company with the Union Pacific and Denver Pacific companies under that authority. They asserted their right and that of the Union Pacific Ry. Co., whose directors they were, to exercise within the State of Kansas all the powers, and to enjoy all the franchises and privileges, of the old Kansas Pacific Co., and this by reason of the consolidation of that company, under the authority of Congress, with the other two companies.

The directors were all citizens of States other than Kansas.

As soon as the answers were put in, petitions were filed by the defendants in each case for the removal of the suit against them respectively to the Circuit Court of the United States for the District of Kansas. The petition of the railroad company alleged as ground for removal, 1, that the suit was one arising under the Constitution and laws of the United States; and 2, that the defendant was a corporation, other than a banking association, organized under a law of the United States, and that it had a defence arising under the laws of the United States. That of the directors was also put on the ground, 1, that the suit was one arising under the Constitution and laws of the United States; and, 2, that the directors were sued as members of a corporation, organized under an act of Congress, for an alleged liability of the corporation, and that their defence arose under and by virtue of the laws of the United States.

Each suit was duly docketed in the Circuit Court of the United States, and, on motion of the State, remanded to the Supreme Court of the State.

From these orders to remand the railway company and the directors, respectively, took a writ of error to this court.

John F. Dillon and Wager Swayne for plaintiffs in error.

Clarence Seward, W. A. Johnston, Attorney-General of the State of Kansas, and W. H. Rossington for defendant in error.

WAITE, C. J.—The right of removal under section 640 of the Revised Statutes, because the Kansas Pacific Ry. Co. was a corporation organized under the laws of the United States, is not insisted upon in this court, and the only questions presented for our consideration are:

1. Whether the suits are of a civil nature at law or in equity, arising under the laws of the United States; and,

2. Whether, if they are, they can be removed under the act of March 3, 1875, c. 137, 18 Stat. 470, inasmuch as they were brought by a State to try the right of a corporation and its directors to exercise corporate powers and franchises within the territorial jurisdiction of the State.

Under the first of these questions it is claimed, in behalf of the State, 1, that the suits are not of a civil nature, because they are proceedings in quo warranto; and, 2, that they do not arise under the laws of the United States.

In Kansas the writ of quo warranto, and the proceeding by information in the nature of quo warranto, have been abolished, and the remedies which were obtainable at common law in those forms are had by civil action. *Dassler's Comp. Laws*, sec. 4192; *Code*, sec. 652. Such an action may be brought in the Supreme Court when "any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or shall claim any franchise within this State, or any office in any corporation created by authority of this State," or "when any association or number of persons shall act within this State as a corporation without being legally incorporated," or when any corporation do or admit [omit] acts which amount to a surrender or a forfeiture of their rights as a corporation, or when any corporation abuses its power, or exercises powers not conferred by law. *Id.* sec. 4193; *Code*, sec. 653.

By the *Code of Civil Procedure*, *id.* sec. 3525; *Code*, sec. 4, "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." Sec. 3527; *Code*, sec. 6: "Actions are of two kinds, first, civil; second, criminal." Sec. 3528; *Code*, sec. 7: "A criminal action is one prosecuted by the State as a party, against a person charged with a public offence, for the punishment thereof." Sec. 3529; *Code*, sec. 8: "Every other action is a civil action." Sec. 3531; *Code*, sec. 10: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be known as a civil action."

The original common-law writ of quo warranto was a civil writ, at the suit of the crown, and not a criminal prosecution. *Rex v. Marsden*, 3 Burr. 1812, 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them (*Com. Dig. Quo Warranto A*), and the first process was summons. *Id.* C. 2. This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a quo

warranto, which, in its origin, was "a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown." 3 Bl. Com. 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was "applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only." 3 Bl. Com. supra; *The King v. Francis*, 2 T. R. 484; *Bac. Ab. Tit. Information D*; 2. Kyd on Corp. 439. And such, without any special legislation to that effect, has always been its character in many of the States of the Union. *Commonwealth v. Browne*, 1 S. & R. 385; *People v. Richardson*, 4 Cow. 102, note; *State v. Hardie*, 1 Iredell Law, 42, 48; *State Bank v. State*, 1 Blackf. 267, 272; *State v. Lingo*, 26 Mo. 496, 498. In some of the States, however, it has been treated as criminal in form, and matters of pleading and jurisdiction governed accordingly. Such is the rule in New York, Wisconsin, New Jersey, Arkansas, and Illinois, but in all these States it is used as a civil remedy only. *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 370, 377; *People v. Jones*, 18 Wend. 601; *State v. West Wisconsin Ry. Co.*, 34 Wis. 197, 213; *State v. Ashley*, 1 Ark. 297; *State v. Roe*, 2 Dutcher, 215, 217. This being the condition of the old law, it seems to us clear that the effect of legislation like that in Kansas, as to the mode of proceeding in quo warranto cases, is to relieve the old civil remedy of the burden of the criminal form of proceeding with which it had been encumbered, and to restore it to its original position as a civil action for the enforcement of a civil right. The right and the remedy are thus brought into harmony, and parties are not driven to the necessity of using the form of a criminal action to determine a civil right. This has been the construction put upon similar laws in other States. *State v. M'Daniel*, 22 Ohio St. 354, 361; *Central & Georgetown R. R. Co. v. Taylor*, 5 Colorado, 40, 42; *Commercial Bank of Rodney v. State*, 4 Sm. & Marsh. 439, 490, 504. These suits are therefore of a civil nature.

That the records present cases arising under the laws of the United States we do not doubt. The attorney-general was instructed by the legislature to institute proceedings against the Kansas Pacific Co. "for an abandonment, relinquishment and surrender of its powers and duties as a corporation to the consolidated company," and against the consolidated company "for usurping, seizing, holding, possessing, and using the franchises and privileges, powers and immunities of the Kansas Pacific Ry. Co. of Kansas." The whole purpose of the suits is to test the validity of the consolidation. The charge is of an unlawful and wrongful consolidation, and from the beginning to the end of the petition against the Kansas Pacific Co. there is not an allegation of default

that does not grow out of this single act. It is, indeed, alleged that the company has not, since the consolidation, made its proper reports, and has not appointed agents on whom process can be served, and has established its general offices out of the State, but no such averments are made as to the consolidated company, and it is apparent that these specifications are relied on only as incidents of the main ground of complaint.

That the validity of the consolidation, so far as the State is concerned, rests alone on the authority conferred for that purpose by the acts of Congress is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress, for, to use the language of Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 825, an act of Congress "is the first ingredient in the case—is its origin—is that from which every other part arises." The right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States. *Cohens v. Virginia*, 6 Wheat. 264, 379; *Gold Washing & Water Co. v. Keyes*, 96 U. S. 201; *Railroad Co. v. Mississippi*, 102 U. S. 140.

We come now to the question whether a suit brought by a State in one of its own courts, against a corporation amenable to its own process, to try the right of the corporation to exercise corporate powers within the territorial limits of the State, can be removed to the Circuit Court of the United States, under the act of March 3, 1875, c. 137, if the suit presents a case arising under the laws of the United States. The language of the act is "any suit of a civil nature . . . brought in any State court, . . . arising under the Constitution or laws of the United States," may be removed by either party. This is broad enough to cover such a case as this, unless the language is limited in its operation by some other law, or by the Constitution. The statute itself makes no exception of suits to which a State is a party.

Art. 3, sec. 1 of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Sec. 2. "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls, . . . to controversies between two or more States; between a State and citizens of another State, . . . and between a State, or the citizens thereof, and foreign States, citizens, or subjects. . . . In all cases affecting ambassadors, other public ministers, and consuls, and those in which a

State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Within six months after the inauguration of the government under the Constitution, the Judiciary Act of 1789, c. 20, 1 Stat. 73, was passed. The bill was drawn by Mr. Ellsworth, a prominent member of the convention that framed the Constitution, who took an active part in securing its adoption by the people, and who was afterwards Chief Justice of this Court. Sec. 13 was as follows: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party." The same act also, by section 9, gave the District Court jurisdiction exclusively of the courts of the several States of suits against consuls or vice-consuls, except for certain offences, and by section 25 conferred upon the Supreme Court appellate jurisdiction for the review, under some circumstances, of the final judgments and decrees of the highest courts of the States in certain classes of suits arising under the Constitution and laws of the United States.

It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the States and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a State was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a State to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties

and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden.

Acting on this construction of the Constitution, Congress took care to provide that no suit should be brought against an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the District Courts, and suits of a civil nature could be brought against them in either tribunal. With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and except, also, between a State and citizens of other States or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States, ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.

The Judiciary Act was passed on the 24th of September, 1789, and at the April Term, 1793, of the Circuit Court of the United States for the District of Pennsylvania, an indictment was found against Ravara, a consul from Genoa, for a misdemeanor in sending anonymous and threatening letters to the British minister and others with a view to extort money. Objection was made to the jurisdiction for the reason that the exclusive cognizance of the case belonged to the Supreme Court on account of the official character of the defendant. The court was held by Wilson and Iredell, Justices of the Supreme Court, and Peters, the District Judge. Mr. Justice Wilson, who had been a member of the convention that framed the Constitution, was of opinion "that although the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction in such inferior courts as might by law be established."

Mr. Justice Iredell thought "that, for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation that the word original means exclusive jurisdiction." The district judge agreed in opinion with Mr. Justice Wilson, and consequently the jurisdiction was sustained. *United States v. Ravara*, 2 Dall. 297.

On the 18th of February, 1793, just before the indictment against Ravara in the Circuit Court, the case of *Chisholm v. Georgia*, 2 Dall. 419, was decided in the Supreme Court, holding that a State might be sued in that court by an individual citizen of another State. The judgment was concurred in by four of the five justices then composing the court, including Mr. Justice Wilson, but Mr. Justice Iredell dissented. This decision, as is well known, led to the adoption of the eleventh article of amendment to the Constitution, which provides that the judicial power of the United States shall not be construed to extend to a suit against a State by a citizen of another State, or by a citizen or subject of a foreign State.

It is a fact of some significance, in this connection, that although the decision in *Chisholm's* case attracted immediate attention and caused great irritation in some of the States, that in *Ravara's* case, which in effect held that the original jurisdiction of the Supreme Court was not necessarily exclusive, seems to have provoked no special comment. The efforts of the States before Congress assembled, and of Congress afterwards, were directed exclusively to obtaining "such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any court of the United States." Resolve of the Legislature of Mass., Sept. 27, 1793.

In *Marbury v. Madison*, 1 Cranch, 137, decided in 1803, it was held that Congress had no power to give the Supreme Court original jurisdiction in other cases than those described in the Constitution, and Chief Justice Marshall, in delivering the opinion, used language, on page 175, which might, perhaps, imply that such original jurisdiction as had been granted by the Constitution was exclusive; but this was not necessary to the determination of the cause, and the Chief Justice himself afterwards, in *Cohens v. Virginia*, 6 Wheat. 264, 399, referred to many expressions in that opinion as dicta in which (p. 401) "the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to

its principle." In concluding that branch of the case, he said, "The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which, in no degree, affect the decision of that case or the tenor of its reasoning."

In *Cohens v. Virginia*, the question was whether the Supreme Court had appellate jurisdiction for the review of the final judgment of the highest court of a State in a suit between a State and one of its own citizens arising under the laws of the United States, and the language of the opinion in that case is to be construed in connection with the general subject then under consideration. The same is true of *Osborn v. U. S. Bank*, 9 Wheat. 737, where the question was whether the Circuit Courts of the United States had jurisdiction of suits by and against the United States Bank. In *United States v. Ortega*, 11 Wheat. 467, the question was for the first time directly presented to this court whether our original jurisdiction was necessarily exclusive, but it was not decided, because the suit was found not to be one affecting a public minister. In *Davis v. Packard*, 7 Pet. 276, the Court of Errors of New York had decided that the character of consul did not exempt Davis, the plaintiff in error, from a suit in a State court; and in reversing a judgment to that effect this court said, speaking, in 1833, through Mr. Justice Thompson, all the other justices concurring, that, "as an abstract question, it is difficult to understand on what ground a State court can claim jurisdiction of civil suits against foreign consuls. By the Constitution the judicial power of the United States extends to all cases affecting ambassadors, other public ministers, and consuls, etc. And the Judiciary Act of 1789 gives to the District Courts of the United States, exclusively of the courts of the several States, jurisdiction of all suits against consuls and vice-consuls, except for certain offences mentioned in the act." In *Cohens v. Virginia*, 6 Wheat. 397, Chief Justice Marshall said: "Foreign consuls frequently assert in our prize courts, the claims of their fellow-subjects. These suits are maintained by them as consuls. The appellate power of this court has frequently been exercised in such cases, and it has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is the party on the record."

Such having been the action of the courts of the United States in construing this provision of the Constitution, the question of the exclusiveness of the jurisdiction in cases affecting consuls was, in 1838, directly presented to Chief Justice Taney on the circuit in the case of *Gittings v. Crawford*, Taney's Decisions, 1, and after reviewing all the cases in an elaborate opinion, he says, p. 9: "The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself,

imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter."

Afterwards, Mr. Justice Nelson, in the case of *St. Luke's Hospital v. Barclay*, 8 Blatch. 259, 265, in 1855, and in *Graham v. Stucken*, 4 Blatch. 50, in 1857, decided the same question in the same way. In the course of his opinion in the last case, p. 52, he uses this language, pertinent to the particular phase of the question which we are now considering: "Again, the grant of original jurisdiction to the Supreme Court is the same in the cases . . . 'in which a State shall be a party,' as in the case of a consul. Those cases are controversies, 1, between two or more States; 2, between a State and citizens of another State; 3, between a State and foreign States; and 4, between a State and citizens or subjects of foreign States, that is, aliens. Now, if the grant of original jurisdiction be exclusive in the Supreme Court in the case of a consul, it is equally exclusive in the four cases above enumerated; for the grant is in the same clause and in the same terms. And yet in the 13th section of the Judiciary Act, already referred to, it is provided that the Supreme Court shall have exclusive jurisdiction, etc., where a State is a party, etc., except between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction. According to the argument, the whole of the exception would be unconstitutional, as the cases mentioned should have been vested exclusively in the Supreme Court." Following these decisions, we have held at the present term, in *Börs v. Preston*, 111 U. S. 252, that consuls may be sued in the Circuit Courts of the United States in cases where the requisite citizenship exists.

In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist.

It remains to consider whether jurisdiction has been given to the Circuit Courts of the United States in cases of this kind. As has been seen, it was not given by the Judiciary Act of 1789, and it

did not exist in 1873, when the case of *Wisconsin v. Duluth*, 2 Dill. 406, was decided by Mr. Justice Miller on the circuit. But the act of March 3, 1875, ch. 137, 18 Stat. 470, "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," does in express terms, provide "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law, or in equity, . . . arising under the Constitution or laws of the United States;" and also that suits of the same nature begun in a State court may be removed to the Circuit Courts. And here it is to be remarked that there is nothing in this which manifests an intention to interfere with the exclusive original jurisdiction of the Supreme Court as established by the act of 1789, and continued by section 687 of the Revised Statutes. The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, and which need not be brought originally in the Supreme Court, may now be brought in or removed to the Circuit Courts without regard to the character of the parties. All admit that the act does give the requisite jurisdiction in suits where a State is not a party, so that the real question is, whether the Constitution exempts the States from its operation.

The same exemption was claimed in *Cohens v. Virginia*, 6 Wheat. 294, to show that the appellate jurisdiction of this court did not extend to the review of the judgments of a State court in a suit by a State against one of its citizens; but Chief Justice Marshall said, "the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his State, but is not entitled to the same force, when urged to prove that this court cannot inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. . . . It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and, therefore, the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting, object was the preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority; and, therefore, the jurisdiction of the courts of the Union was expressly extended to all cases arising under the Constitution and those laws. If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends

the judicial power of the Union to all cases arising under the Constitution and laws? After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the Constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties." (pp. 391-2.)

The language of the act of 1875 in this particular is identical with that of the Constitution, and the evident purpose of Congress was to make the original jurisdiction of the Circuit Courts co-extensive with the judicial power in all cases where the Supreme Court had not already been invested by law with exclusive cognizance. To quote again from Chief Justice Marshall, in *Cohens v. Virginia*, p. 379, "the jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this kind from that jurisdiction must sustain the exemption they claim, on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed." This rule is equally applicable to the statute we have now under consideration. The judicial power of the United States extends to all cases arising under the Constitution and laws, and the act of 1875 commits the exercise of that power to the Circuit Courts. It rests, therefore, on those who would withdraw any case within that power from the cognizance of the Circuit Courts to sustain their exception "on the spirit and true meaning of the" act, "which spirit and true meaning must be so apparent as to overrule the words its framers have employed." To the extent that the words conflict with other laws giving exclusive original jurisdiction to the Supreme Court this has been done, but no more. The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among courts.

We conclude, therefore, that the cases were removable under the act of March 3, 1875.

The order to remand in each case is reversed, and the Circuit Court directed to entertain the cases as properly removed from the State court and proceed accordingly.

WILMINGTON, COLUMBIA AND AUGUSTA R. R. Co.

v.

LING.

(18 *South Carolina Reports*, 116.)

In action by a railroad company against the sureties on the bond of a station-agent, who was in arrears to the company when the bond was executed, and continued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury "that if the plaintiffs knew when the bond was given, that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them."

But in charging further "that each default of the agent, after the bond was given, in failing to pay over to the company the money collected by him, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them;" he erred in failing to limit the discharge to defaults occurring after the first.

The judge erred in refusing to charge the jury "that, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties."

He also erred in refusing to charge "that the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do so."

ACTION by the plaintiffs against Joseph J. Ling, Isaiah L. Wright, James M. Hunter and Ira M. Harrell, commenced August 20, 1878. The opinion states the case.

J. H. Rion for appellant, cited the authorities referred to in the opinion, and also the following: 2 De G. & J. 609; 3 Hurlst. & C. 437; 59 Ga. 685; 18 Wall. 662; 64 N. Y. 385; 1 Pet. 61; 1 Story Eq., § 190. Upon the point that a verdict for plaintiffs should have been directed, the learned counsel cited Code, § 289; 35 Barb. 651; 15 N. Y. 251; 37 Barb. 343; 13 S. C. 115; 4 Otto, 284.

Boyd & Nettles, contra, cited 8 S. C. 122; 6 id. 289, 411; 14 Id. 177; 1 Dow, 272, 294; 3 Moak Eng. R. 265; 10 Bush, 23; 2 White & T. Lead. Cas. 707; 11 Wheat. 59; 3 Macn. & G. 378; 58 N. Y. 541; 8 Law R. Ex. 73.

SIMPSON, C. J.—The plaintiff, appellant, a railroad corporation under the laws of this State, employed the defendant, Joseph J. Ling, to act as their agent at Timmons ville, in the county of Darl-

ington. Some four months after the said Ling had been acting as such agent, to wit, on May 1, 1870, he executed and delivered to the plaintiff a bond with the other parties named as his sureties, conditioned generally for the faithful discharge of his duties, and especially that he would well and truly account for and pay over to the said company all moneys that might come into his hands, or for which he might be accountable by reason of his appointment.

At the time this bond was given, Ling was behind some \$497.40. The testimony does not show whether the sureties were aware of this fact or not, when they executed the bond. Ling continued in office until February 17, 1873, when he was dismissed, at which time he was a defaulter to the amount of \$1737.48, which sum was afterwards reduced by certain cash receipts to \$1526.57. The account between Ling and the company, introduced in evidence, embracing his monthly standing, showed that he was frequently behind from the beginning of his agency. These sums had been carried forward until finally, upon his dismissal, after the credits above referred to had been allowed, the balance against him amounted to \$1526.57. For this balance the action below was brought on the bond of indemnity.

Wright, one of the sureties, was never made a party, and Ling died before the trial, so that at the trial the action stood against the two sureties, Hunter and Harrell. These defendants relied upon two defences. First, "that Ling, before the execution of the bond sued on, having been agent of the appellants at Timmons ville, had committed default by failing to pay over moneys collected, and was indebted, when the bond was executed, in a considerable sum by reason of said default; that the appellants, knowing these facts, concealed the same from the defendants, Hunter and Harrell, and impliedly held out Ling as a trustworthy person and competent agent, when they knew or had reason to believe the contrary." Secondly, "that shortly after the execution of the bond, Ling made default as agent, and thereafter continued to make defaults by failing to pay over money collected by him; that these facts were known to the appellants, but, instead of dismissing Ling from their employment, they gave no notice to his sureties, condoned his faults, connived at the same, and continued him in their employment as agent." The defendants claimed that, on the first ground, the bond was void as to them, and, on the second ground, that if ever liable on the bond they had been discharged from that liability by the fraudulent conduct of the appellants. The action was submitted to a jury under the charge of the presiding judge, and the verdict was for the defendants.

His Honor, Judge Wallace, charged the jury, "that if the plaintiffs knew, when the bond was given, that Ling was in default and indebted to them in his pre-existing agency, and yet concealed this fact, and held him out to them as trustworthy, either expressly or

impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them;" and, secondly, "that each default of Ling, after the bond was given, in failing to pay over to the company the money collected by him as their agent, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that, if knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them."

He declined to charge the following requests of the plaintiffs:

1. "That, as matter of law, it was no fraud upon the sureties to the bond in suit that the principal was behind in his accounts at the time the bond was given, and no notice was given to the sureties.
2. That the plaintiffs were not bound to notify the sureties of each or any default of the principal agent, and that the sureties were not discharged by failure on their part to do so.
3. That there is no proof whatever that the plaintiffs held out Ling as competent and trustworthy, or in any way imposed upon the sureties; and that in law the railroad company did nothing that would discharge the sureties.
4. That there is no fact for the jury to find but the default and the amount of the default; and there is no law in the case to prevent the recovery by the plaintiff of the amount proven."

The appeal is founded upon the charge, and the refusal to charge, as hereinabove.

The charge of the judge, so far as reported, seems to have been directly upon the two grounds of defence relied upon by the defendants and set up in their answer. It was nothing more than a declaration by the judge that if the evidence in the case sustained the averments in the answer as to matters therein alleged as a defence, in law the defendants had a good defence. Subject to the modification hereinafter suggested, we think the principles laid down were sound. The law requires good faith in parties contracting with each other; and the high moral principle, that misrepresentation or concealment of a material fact in reference to the matter contracted about, or any device by the one to prevent the other from being fully informed, will vitiate the contract, is found in all text-writers upon the subject of contracts, and is sustained by numerous decisions, not only in this State, but in all the courts where the English common law prevails.

This principle applies in its fullest force to contracts on suretyship. Judge Story (1 Eq. Jur. § 324) says: "The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction; any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage, information or surprise taken of the surety by the creditor, will undoubtedly furnish a sufficient ground

to invalidate the contract." See also Ad. Eq. *179, where the same doctrine is announced:

The propositions of law, charged by the judge, were in accordance with these principles, except that he went too far in holding, in the second proposition, that, if the appellants knew of Ling's default accruing after the execution of his bond, and yet, notwithstanding this, they continued to employ him, condoning his default, and giving no notice to his sureties of his misconduct, this would discharge the sureties entirely. This, no doubt, was good law, so far as it warranted the discharge of the sureties from the culpable defaults occurring subsequent to the first default, after the execution of the bond, but it was error to hold that the sureties would be entirely discharged thereby, even though there had been a fraudulent concealment of the first default. Because, in any event, the first default was a breach of the bond, and against this the fraudulent continuation of the employment of the agent afterwards was no defence. The judge should have limited the discharge, even upon the facts supposed, to the defaults occurring after the first.

We think the judge was in error, too, in refusing to charge the two first requests of the appellants. We have carefully examined the cases referred to by counsel on both sides, and although there is some conflict in the decisions, we think the weight of the argument is in favor of the position that there must be some positive act of concealment or misrepresentation on the part of the obligee in cases like this before the court, as to some fact which it was his duty to discharge, before the sureties can be relieved. Silence, merely, especially as to facts within the reach of proper inquiry by the sureties, will not be sufficient. The law stands between the parties perfectly impartial, ready to rebuke fraud, concealment, or misrepresentation on the part of either, but carelessness and want of proper vigilance are left to their own fruits. There must be an intent to deceive, not a mere passive omission to state everything within the knowledge of the creditor. The intent is the gist of the fraud, and this should be made to appear. *Stafford v. Newsom*, 9 Ired. 507; *De Colyar on Prin. and Sur.* 367; *Atlas Bank v. Brownell*, 9 R. I. 168; *Roper v. Sangamon Lodge*, 91 Ill. 518.

We were at first inclined to think that the presiding judge, in his charge, had laid down the law applicable to such cases in its fullest extent, subject to the modification hereinabove. He required actual concealment or misrepresentation to be found as a fact by the jury before relieving the sureties. This seemed to be all that the plaintiffs could claim. But upon examination of the cases, where this question has been discussed, while we do not find any legal adjudication of what will constitute concealment or misrepresentation in such form as to be applied as a test in every case where the question is presented, yet we find several decisions in

other States where certain facts have been held not to amount to such concealment. For instance, it has been held as matter of law that it was no fraud upon the sureties that the principal was behind in his accounts at the time he gave his bond of indemnity and no notice given to the sureties, and also that the obligee was not legally bound to notify the sureties of each and every default of the principal. See *Guardian of the Stakely Union v. Stratter*, 22 L. T. Eng. 84; *Roper v. Sangamon Lodge*, 91 Ill. 518; *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Shaffer et al.*, 59 Pa. St. R. 350; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85; *Taft v. Gifford*, 13 Met. 187.

It is the business of the surety to see for himself that his principal performs the duty which he has guaranteed. The surety is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts. Now the principle, as laid down in these cases referred to above, is precisely what the appellant requested the judge to charge in his two first requests, and which, being refused, is made grounds of exception.

The strongest adverse case is the case of *Phillips v. Foxall*, 3 Moak's Eng. R. 264. But that case, when analyzed, does not conflict with the principles above. That case turned upon a demurrer. The defendant set up the defence, that the plaintiff had condoned the default of the servant in not paying over money collected, which the defence directly charged had been embezzled by the servant, and which fact was known to the employer, and, notwithstanding this, he had continued the servant in his employment without notice to the sureties of the embezzlement. The plaintiff demurred to this plea. The court overruled the demurrer and sustained the plea. The court said: "We think that in a continuing guarantee for the honesty of the servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service." The ground of the defence in that case was the dishonest act of the servant—embezzlement—known to the plaintiff. The ruling of the court on the demurrer, which admitted the truth of the charge against the servant, was right, and the defence was properly admitted.

But there is a broad distinction between a case of that kind and a case where it simply appears that the agent is behind in his accounts. Knowledge on the part of the employer of dishonesty and corruption in his agent, without disclosure, would amount to a fraudulent concealment, but a falling behind in current accounts

by an agent is not always the result of dishonesty. We do not think that simply the failure on the part of the employer to give notice to the sureties that the agent is behind in his accounts at the time he executes the bond, or that he has fallen behind since the execution of the bond, is such a fraudulent concealment of material facts as, in itself, without more, should discharge the sureties. These facts might properly go to the jury with other facts bearing upon the question of fraudulent concealment and have such weight as would be proper, but standing alone they would not be sufficient to discharge the sureties.

We think the appellant was entitled to the charge requested in the two first requests. The other requests of appellant were properly refused, involving, as they did, questions of fact mostly.

It is the judgment of this court that the judgment of the circuit court be reversed and the case be remanded for a new trial.

Official Bonds—Notice of Default to Sureties—Misconduct Prior to Execution of Bond.—When the official bond of an officer is given to a corporation, the corporation is bound, if fit opportunity offers, to inform the sureties of any material facts within its knowledge relative to the trustworthiness of the officer, such as prior defaults and the like, which might affect the readiness of the sureties to become responsible for him. If they fail to do this the surety will be discharged. *Franklin Bank v. Cooper*, 36 Me. 179; *Dinsmore v. Tidball*, 34 Ohio St. 411; *State v. Atherton*, 40 Mo. 209; *Graves v. Lebanon Nat. Bank*, 10 Bush. 23; *Western N. Y. L. I. Co. v. Clinton*, 66 N. Y. 326; *Ætna L. I. Co. v. Mabett*, 18 Wisc. 677. But see *Wayne v. Commercial Nat. Bank*, 53 Pa. St. 343; *Magee v. Manhattan L. I. Co.*, 92 U. S. 93; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Atlas Bank v. Brownell*, 9 R. I. 168; *Bostwick v. Van Voorhis*, 1 Am. & Eng. R. R. Cas. 337.

Notice of Default after Execution of Bond.—The corporation is not bound on discovering that an officer is in default at once to notify the sureties. A failure thus to notify them does not discharge them from liability. *Morris Canal, etc., Co. v. Van Vorst's Adm'x*, 31 N. J. L. 100; *Pittsburgh, etc., R. Co. v. Shaeffer*, 59 Pa. St. 359; *Grocers' Bank v. Kingman*, 16 Gray, 473; *Pell v. Tatlock*, 1 Bos. & Pull. 419.

Retention in Office after Default.—The corporation cannot, however, after detecting a default on the part of an officer or agent, retain him in its employ and claim to hold the sureties liable for subsequent defaults. *Taylor v. Bank of Ky.*, 2 J. J. Marsh, 564; *Phillips v. Foxall L. R.*, 7 Q. B. 666. But it will not relieve the surety from liability for prior default. *State Bank v. Chetwood*, 8 N. J. Law, 1. And see *Union Bank v. Forstall*, 11 La. 211. And it is only where the default is evidently a dishonest one, amounting to a breach of the bond, that the corporation is bound to discharge the delinquent. *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 335. See *McKecknie v. Ward*, 53 N. Y. 541; *Albany Dutch Church v. Vedder*, 14 Wend. 165; *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. 218.

STANLY

v.

RICHMOND AND DANVILLE R. R. Co.

(87 North Carolina Reports, 881.)

In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity; and if this is disputed, it should be by answer and not by demurrer.

The complaint in this case alleging negligence, is sufficiently explicit in the statement of facts constituting such negligence.

CIVIL action tried at Fall Term, 1883, of Orange Superior Court.

The plaintiff sues to recover in damages the value of a horse belonging to him, and which he alleges was struck and killed by a train of cars passing over the defendant's road in the month of April, 1882. The complaint charges that this was done negligently at a portion of the road between two designated stations, which ran for half a mile in a straight course on a level surface where there were neither cuts nor embankments. It does not aver the defendant to be a corporate body.

The defendant interposed a demurrer, specifying as the grounds therefor the absence of any allegation in the complaint of the corporate capacity of the defendant; and secondly, its failure to set out the facts which constitute the negligence, by reason of which defects the complaint does not state facts sufficient to show a cause of action against the defendant.

The demurrer was overruled and the defendant allowed to answer, and from this judgment the defendant appeals.

Fuller & Snow for plaintiff.

D. Schenck for defendant.

SMITH, C. J.—While the principle seems to be well settled that in actions by corporations of whose existence, or the law of their being, the court cannot take judicial notice, as it must of municipal and public corporations, under our former system of pleading it was not necessary the declaration should aver the plaintiff to be such, there is much diversity in the adjudications as to whether, where the defendant pleads the general issue and denies the right of action, the plaintiff is compelled to prove the corporate capacity in which it sues.

In England and in some of the States this burden is held to rest upon the plaintiff, and is essential to a recovery, while in many of the States the defence under such plea is held to be an admission

of the plaintiff's existence as a corporate body and to dispense with all proof by it to that point. *Am. & Eng. Corp.* §§ 632, 633, and numerous cases referred to in the notes.

In the case of *Ins. Co. v. Osgood*, reported in 1 *Duer* (N. Y.), 707, in answer to the objection that the plaintiff's corporate character was not alleged, the court said: "It does not appear on the face of the complaint that the plaintiff is not a corporation. It does not therefore appear that the plaintiff has not legal capacity to sue. Unless that appears a demurrer cannot be sustained, based on that objection."

So where the defendant's counsel insisted that a declaration describing the defendant as a company without showing whether or not it was a corporation was open to a demurrer, Mr. Justice Maule said: "There is no positive rule that I am aware of which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form. It impliedly amounts to an allegation that the defendant is a corporate body." *Wolfe v. Steamboat Co.*, 62 *E. C. Law Rep.* 103.

It seems to have been in the contemplation of the Code of Civil Procedure that while the plaintiff's want of legal capacity, appearing in the complaint, to maintain the suit, could be taken advantage of by demurrer, all other objections relating to parties must be made by answer, the answer taking the place of a plea in abatement (§ 95).

It is difficult to assign any sufficient reason why a corporation suing or sued should be designated by any further description than its corporate name, which does not apply with equal force to a natural person, the only purpose in either case being to point out the party to the action. The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and if intended to be disputed it should be under the present practice by answer.

The other assigned cause of demurrer is in our opinion equally untenable. Though not stated with accuracy, the complaint alleges negligence in running the train on a straight part of the track with no obstructions to hide the animal from the engineer's view, and striking the horse when proper vigilance and care would have avoided the accident. We do not see how greater particularity could be required in the statement of facts.

There is no error in the ruling, and this will be certified.

No error.

Affirmed.

Ex parte St. Louis, Iron Mountain and Southern Ry. Co.(40 *Arkansas Reports*, 141.)

The truth of an officer's return of service of a summons cannot be questioned in the action nor in proceedings by certiorari to review it. The remedy is against the officer for a false return.

A summons upon a railroad company may now, by statute, be served upon a station agent, or other person having control of any of the company's business, who has to report to the company, or upon the clerk or agent of any station in the county where it is issued.

Dodge & Johnson for petitioner.

SMITH, J.—One Hampden brought an action in the Craighead Circuit Court against the railway company to recover the value of certain goods alleged to have been entrusted to the defendants as a common carrier, and to have been lost. The writ commanded the sheriff to summon the St. Louis, Iron Mountain & Southern Ry Co. And that officer indorsed upon it the following return:

STATE OF ARKANSAS, }
COUNTY OF CRAIGHEAD, } SCT.:

I have this 2d day of March, 1883, duly served the within by delivering a true copy of the same to the station agent, A. J. Henna, at Nettleton, on said railroad. W. T. LANE, Sheriff."

The company did not appear, and judgment by default was rendered against it.

We are now asked to quash this judgment because the court had acquired no jurisdiction over the person of the defendant.

It is suggested that the return does not show a service of the writ upon the station agent of the corporation; in other words, does not show that Kenna was its agent. But whatever ambiguity there may be in the return is removed by an examination of the summons upon which it is indorsed. *Building Association v. Hagan*, 28 Ark. 261.

The sheriff asserts that he left a copy of the writ with Kenna, and that Kenna was then the agent of the defendant. If this is not so, the remedy is by action against the sheriff for a false return. But the truth of the return could not be controverted either in that action or in a review upon certiorari. *Hollowell v. Page*, 24 Mo. 590; *Delinger v. Higgins*, 26 id. 180; *Stewart v. Houston*, 25 Ark. 311.

The objection that the return does not show that the service was had in the officer's own county was settled by this court at an early day, when technicalities met with more favor than the courts are now disposed to accord to them. *Henry v. Ward*, 4 Ark. 150; *Elliot v. Bank*, ib. 437; *McNabb v. Bank*, ib. 555.

It is further urged that the return does not show the absence of the President or other chief officers of the corporation from the county at the date of service. Section 4515 of Gantt's Digest required the sheriff, where he had served process upon an inferior officer of the corporation, to state as a reason for such service that the chief officer was not to be found in his county. *C. & F. R. Co. v. Trout*, 32 Ark. 17. But the amendatory act of March 9, 1877, has changed this. Now, in the case of a railroad corporation, service is authorized upon any station agent or other person having control of any of the company's business, who has to report to the company which employs him, or upon the clerk or agent of any station in the county where the process is issued.

The writ of certiorari is denied.

See *Lung Chung, Adm'r, v. Northern Pacific R. Co.*, and note, *infra*.

LUNG CHUNG, Adm'r, etc.,

v.

NORTHERN PACIFIC RY. CO.

(Advances Case, District Court, D. Oregon. February 8, 1884.)

A defendant in an action, upon whom a summons has been served illegally, may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon Code of Civil Procedure derogatory of such right.

Subdivision 1 of section 54 of said Code, when applied to actions in the national courts, must be construed as if the word "county" read "district."

In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier, or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant.

A cause of action given by statute to an administrator to recover damages for the death of his intestate arises out of such death, and where it occurred; and not the appointment of the administrator or the place where it was made.

ACTION for injury to the person. Motion to set aside the service of a summons.

John H. Woodward for Lung Chung.

O. P. Mason for Buchanan.

Cyrus A. Dolph for defendant.

DEADY, J.—These actions are each brought to recover damages for an injury to the person, caused by the negligence and misconduct of the defendant. In Lung Chung's case it appears from the complaint that on June 21, 1883, Lung Ban was at work on the

grade of defendant's railroad, in Montana, about ten miles to the westward of Herron's Siding, when he was killed by the wrecking of a train on which he was being carried from the place where he was working to the camp of the contractors, On Chung Wa Co., under whom he was employed; and that on November 23, 1883, the county court of Multnomah county, Oregon, granted letters of administration upon the estate of the deceased to the plaintiff, who is a citizen of China. In Buchanan's case it appears that the plaintiff is a citizen of Nevada, and that on February 13, 1883, he was at work for the defendant as a carpenter, repairing bridges, on the line of its road in Washington Territory, when, by the falling of timbers from a platform car, he had his arm and wrist broken, and was otherwise injured. In each case it appears that the defendant is a corporation formed under a law of the United States; and in Buchanan's case it also appears that its principal place of business is at New York; while in Lung Chung's case it is also alleged that the defendant was so organized for the purpose of constructing and operating a railway from Minnesota to Oregon and Washington Territory; of all which, except the place of business, the court takes judicial notice. A summons was duly issued in each case, and from the return of the marshal thereon it appears that not being able to find the president, secretary, cashier, or managing agent of the defendant in this district, he served the summons on Homer D. Sanborn, "the purchasing agent" of the defendant herein. The defendant now moves to set aside the service of the summons in each case, having given the plaintiffs written notice of its appearance for that purpose; and by consent of parties the motions are heard together.

And, first, the counsel for the plaintiff in Buchanan's case insists that the defendant cannot appear for this purpose only—that it must either appear fully and without reserve or not at all, citing sections 61 and 520 of the Oregon Code of Civil Procedure. By the first of these sections it is provided, in effect, that a voluntary appearance of the defendant shall, for the purpose of giving the court jurisdiction, be equivalent to a personal service of the summons; while the latter declares that "a defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance; and until he does so appear he shall not be heard in such action or suit, or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property." Section 61 contemplates, of course, a full and unqualified appearance, and declares the effect of it on the jurisdiction of the court; but it has no bearing on the question whether a defendant has a right to make a qualified appearance for a special purpose, as to set aside an attachment or the service of a summons. So, an appearance under said section 520, by de-

livering a demurrer or answer to the complaint, is in the nature of things an unqualified appearance. There is only one other way for a defendant to appear, and that is by giving the plaintiff written notice thereof. And the question is, can that appearance be something short of a general appearance and for a particular purpose? There is nothing in the Code to the contrary. The statute says the defendant may appear by a written notice. This does not necessarily imply a full appearance or exclude a qualified one. If the defendant desires, in the language of the statute, to appear, not to the action, but in a "proceeding pertaining thereto," why may he not, and what is there in section 520, or the nature of the proceeding, to prevent it? The right to appear specially and move to set aside the service of a summons is one thing, and the allowance of the motion is another. When the summons or the service thereof is merely defective or wanting in some matter of form or method which does not affect the substantial rights of the defendant, the motion to set aside will be disallowed, or a counter motion allowed to amend. But where the service is unlawful, and cannot give the court jurisdiction of the defendant, it ought to be set aside or quashed, and, unless the party upon whom it is made is allowed to appear for that purpose, he must run the risk of having a judgment given against him for want of an answer, in a case where it may be there is no appeal, and, if there was, the illegality of the service is not apparent on the face of the record.

In *Lyman v. Milton*, 44 Cal. 635, and *Kent v. West*, 50 Cal. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and, in the other, to set aside the illegal service of a legal summons; and further, that the wrongful denial of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case.

To the same effect is the case of *Harkness v. Hyde*, 98 U. S. 476, in which it was held that the service of a summons from a district court in Idaho, upon a defendant while on an Indian reservation, from which the jurisdiction of the court was by law excluded, was unlawful, and that the defendant was entitled to appear specially, to have such illegal service set aside; and further that the error committed in denying the motion to set aside was not waived by the defendant's subsequent appearance and submission to a trial of the cause.

The cases under consideration are within the rulings made in these cases, and I see nothing in the Code to take them out of it. Nothing less than the express language of a statute or the necessary implication therefrom would be construed by any court of justice as forbidding or preventing a party to appear in an action for the purpose of having the service of a summons set aside, on the ground that it was illegally served upon him,—not in manner,

but in substance,—and under such circumstances as not to give the court any jurisdiction of his person, or authority to proceed to judgment against him.

By the act of 1875 (18 St. 470) it is provided that no civil suit shall be brought before any circuit court against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," saving certain exceptions not now material. Whether the defendant is an "inhabitant" of this district, within the meaning of this act, need not now be considered. If it is such an inhabitant it cannot be brought before this court as a defendant in this action unless by the due service of a summons upon it; nor can it be "found" here for such purpose, only so far as it can be so served here. And in either case we must look to the local law prescribing the method of serving a summons on a corporation to ascertain what constitutes such service and the effect of it. The defendant, being a mere legal entity, cannot be directly served with process. From the nature of the case the service must be a substituted one. Generally, it is made upon some natural person for it. This person is usually designated by the local law, upon the theory that his relation to the corporation is such that notice to him will result in notice to it.

By section 54 of the Code of Civil Procedure, as amended in 1876 (Sess. Laws, 37), it is provided that in case of an action against a private corporation the summons shall be served on "the president or other head of the corporation, secretary, cashier, or managing agent," or in case none of these officers "shall reside or have an office in the county where the cause of action arose, then on any clerk or agent of such corporation who may reside or be found in the county; or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." Allowing that the practice in this court, in this respect, must conform "as near as may be" to the directions of this section, as provided by section 914 of the Revised Statutes, still the word "county," as used therein, must in this court be understood to mean the "district" or territorial limit of the court's jurisdiction. The defendant, although an inhabitant of this district, cannot be brought before this court in a civil action, unless it is served with a summons in the mode prescribed in this section. If the action is transitory in its character, and service of the summons is made within the district on the president, secretary, cashier, or managing agent of the defendant, the court acquires jurisdiction without reference to where the cause of action arose. But if neither of them can be so served, the action cannot be maintained in the district unless the cause of action arose therein. For the statute, in giving a plaintiff the right to serve a summons against

a corporation upon any inferior agent or clerk thereof, where the superior ones cannot be found in the district, limits the same to cases where the cause of action arose in the district. Now, in each of these cases the cause of action arose without the district, and therefore the service of the summons thereon upon an agent of the corporation who does not appear to be its "managing" one, or its secretary, cashier, or president, is unauthorized and illegal. The illegality arises, not from a defect in form or method, but in substance, and is therefore incurable. In effect, the law does not, under these circumstances, permit the defendant to be brought before this court in civil action without its consent upon a cause of action that arose without the district.

The suggestion of counsel for the plaintiff, in Lung Chung's case, that the cause of action ought to be considered as having arisen within the district because the plaintiff's letters of administration were granted here, is ingenious, but not sound. On the contrary, the cause of action arose in Montana on the death of the deceased,—the law of that territory giving an action to his heirs or personal representatives for damages on that account. The plaintiff's right to sue on this cause of action may be said to have originated here, but the grant of administration to him did not create or originate the cause of action, though it gave him a certain control over it.

The motions are allowed, and the service set aside.

Service of Process upon Chief Officer.—At common law the agent or servant upon whom process could be served must have been the chief officer in that particular department. *Gillig v. Independent Mining Co.*, 1 Nev. 247; *Glaize v. South Carolina R. R. Co.*, 1 Strobb. (S. C.) 70; *Chamberlin v. Mammoth Mining Co.*, 20 Mo. 96; *Boyd v. Chesapeake & Delaware Canal Co.*, 17 Md. 195; *O'Brien v. Shaw's, etc., Canal Co.*, 10 Cal. 348; *Willamette, etc., Co. v. Williams*, 1 Oregon, 112; *McCall v. Byram M'fg Co.*, 6 Cam. 428; *Berrian v. Methodist Society*, 4 Abb. Pr. 424.

Service of Process upon Other Officers.—As to service upon other officers and the sufficiency thereof, see *New Albany, etc., R. Co. v. Ticon*, 12 Ind. 3; *Ohio, etc., R. Co. v. Guier*, 16 Ind. 440; *New Albany, etc., R. Co. v. Grooms*, 9 Ind. 248; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422; *St. Clair v. Cox*, 1 Am. & Eng. Corp. Cas. 19; *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. R. Cas. 59.

Service of Process upon Managing Agent.—It is frequently provided by statute that process may be served upon an agent having general management of the business of the corporation. As to who is an agent within the meaning of this clause, see *Donadi v. New York, etc., Ins. Co.*, 2 E. D. Smith, 519; *Doty v. Michigan Central R. R. Co.*, 8 Abb. Pr. 427; *Flynn v. Hudson River R. R. Co.*, 6 How. Pr. 308; *Bain v. Globe Ins. Co.*, 9 How. Pr. 448; *Bank of Commerce v. Rutland, etc., R. R. Co.*, 10 How. Pr. 1; *American Express Co. v. Johnson*, 17 Ohio St. 641; *Upper Mississippi Trans. Co. v. Whittaker*, 16 Wisc. 220; *Carr v. Commercial Bank*, 19 Wisc. 272.

CHICAGO AND ALTON R. R. Co.

v.

WALKER.

(9 *Lea's Reports (Tenn.)*, 475.)

The C. & A. R. R. Co., having no office nor any part of its line in this State, employed B as its agent in this State to induce travellers to take such routes as connected with their line. B had no authority to sell tickets for his principal, and his business, which consisted principally in securing emigrants as patrons for his company, required that he should travel from place to place, see passengers, aid them in purchasing tickets, and checking baggage on connecting lines, and correspond with persons likely to travel over his principal's line. His presence was frequently required at C., in this State, that place being a railroad centre of lines connecting with his principal's, but he had no office or place of business there. W. sued the company for breach of a contract made with B, serving process on B, whose want of authority to receive the service of process was raised by plea in abatement. *Held*, that the service was invalid and the plea good.

APPEAL in error from the Circuit Court of Hamilton County.

Key & Richmond for railroad.

Vandyke, Cooke & Vandyke for Walker.

McFARLAND, J.—This action was begun by Walker in the circuit court of Hamilton county. The sheriff returned the process "executed by serving the within on Charles F. Ludlum, principal agent of the defendant in Hamilton county." The defendant pleaded in abatement that it was a foreign corporation, created under the laws of Illinois; that its line of road is in the States of Illinois and Missouri, and its principal office in the city of Chicago in the former State; that Charles F. Ludlum was never appointed agent of defendant in Hamilton County, Tennessee, and had no authority to accept service of process for defendant, and defendant had no office or agency in Hamilton county, Tennessee, at the time plaintiff's cause of action accrued or since.

The plaintiff filed a replication, which was accepted by the court below as a sufficient traverse of this plea. Upon this issue the case was tried, resulting in a judgment for the plaintiff.

There is no very material conflict in the proof. The Chicago & Alton R. R. Co. has no road or general office in this State; a part of its line extends from St. Louis to Kansas City and constitutes a link in one of the competing lines to California and the West. Ludlum was, in the language of the general passenger and ticket agent, "the Southern passenger agent of said company for all the

territory south of the Ohio river and also the States of Virginia, Arkansas and Texas." For part of the time his "headquarters" were at Chattanooga, and afterwards at Nashville—the change taking place, according to witnesses, about February, 1880. He had, however, no fixed residence or place of business. His business was to solicit travel over his line of road, that is, to solicit travellers to take a route that would lead over his road. He sold no tickets, and was not authorized to sell tickets. His course of business was, when he found a passenger willing to take his route, to conduct him to the ticket agent of the connecting road at the point, who would sell him a ticket over the various roads. He would also assist the passenger in checking his baggage, and give him information, etc. He distributed advertisements or "folders," as they are termed, representing the superior advantages of his line. One of these exhibited in proof has the name of Ludlum thus: "Charles F. Ludlum, Southern passenger agent, under the Read House, Chattanooga." In point of fact, however, he kept no office or place of business. He "hunted up" the passengers and emigrants about the depots, car sheds, or wherever he could find them. By "headquarters," the witnesses say, is only meant the place where he received his mail; and after he had changed his "headquarters" from Chattanooga to Nashville, he continued to carry on his business at Chattanooga, "about as before."

His business required him to travel over any portion of the States or territory mentioned, where he could find passengers or emigrants. Chattanooga was a good point, as several roads centred there, and he was often at that point, but was confined to no particular place.

On the 24th of April, 1880, Ludlum induced the plaintiff, who was going to California, to take his route, and conducted him to the ticket office of the Nashville, Chattanooga & St. Louis R. R. at Chattanooga, where the agent of the company sold plaintiff a through ticket to San Francisco.

The ground of the action is, that Ludlum promised plaintiff that in passing over the road of the Chicago and Alton Co. from St. Louis to Kansas City in the night, he should have a car with reclining seats, equal to a sleeping car, and that this agreement was grossly violated by the conductor when the plaintiff reached that part of the route.

The question was, whether upon these facts service upon Ludlum was sufficient to give the court jurisdiction of the defendant. The action is transitory, and such actions, unless otherwise expressly provided, may be brought wherever the defendant is found. A corporation is in general supposed to be located at its principal office, but it may be that a corporation can be said to be situated, for the purpose of being sued, wherever it has an established place of business, even without special legislation upon the subject.

With respect to foreign corporations, it is sometimes provided as a condition of their being allowed to do business in this State, that they shall keep agents here, authorized to acknowledge service of process. Code, sec. 1500. But where this is not in terms provided, there is no doubt that foreign corporations may be held subject to the general provisions of our statutes with respect to service of process on corporations, and it is perfectly legitimate to construe these provisions as applicable to foreign as well as domestic corporations, where the language employed will allow this construction. Foreign corporations doing business in this State, with a knowledge of these provisions, cannot complain that they are made to apply to them.

It only remains to examine the provisions of our statutes upon the subject. Code, sec. 2831, is in these words: "Service of process on the president or other head of a corporation, or in his absence on the cashier, treasurer, or secretary, or in his absence, on any director of such corporation, will be sufficient." This section, it will be readily seen, does not meet the present case. The next is: "If neither president, cashier, treasurer or secretary resides within the State, service upon the chief agent of the corporation residing at the time in the county where the action is brought shall be deemed sufficient." (Sec. 2832.)

The next section relates to actions brought in the county where the principal office of the corporation is located, and is, therefore, not applicable.

Section 2834 is as follows: "When a corporation, company or individual has an office or agency in any county other than that in which the principal resides, the service of process may be on any agent or clerk employed therein, in all actions growing out of, or connected with, the business of the office or agency."

This is substantially the same as sec. 2811. Secs. 2831, 2832, 2833 and 2834, are amended by the act of 1859-60. Section 2834a is in this language: "That hereafter, when a corporate company or individual has an officer (evidently meaning an office) or agency or resident director, in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein, in all actions brought against said company, growing out of the business of, or connected with said company or principal business."

These various sections comprise all our legislation upon the subject. They appear to have been intended more directly to indicate the county in which actions shall be brought against domestic corporations, but are comprehensive enough to apply to foreign corporations. The sections which appear to be more directly applicable are: First, section 2832, which, as we have seen, applies to cases where neither the president, cashier, treasurer or secretary resides in the State, in which case service may be had upon the chief agent

residing at the time in the county where the action is brought. We have seen, however, that the proof all agrees that Ludlum was not at any time residing in Hamilton county. He only stopped there temporarily, as his business required. He was a travelling agent, and was no more a resident of Hamilton county than of the various other points where he did business. It can hardly be said that he was at the same time a resident of all these various points, or that his residence changed as often as he moved from one point to another; and this would logically follow from holding that he was, in the sense of this statute, an agent residing in Hamilton county. We predicate nothing upon the proof that before the service of process he had changed his "headquarters" to Nashville, but for the argument concede that he was as much a resident of Hamilton county after that as before.

The other sections to be considered, are sections 2811 and 2834, as amended by sec. 2834a. Sections 2811 and 2834, before the amendment, provided that where an office or agency was kept in any county other than the principal office, service of process might be had upon any agent or clerk employed therein, in all actions growing out of the business of the office or agency. We held in *Toppins v. Railroad*, 5 Lea, 600, that by the amending section, 2834a, the service in such cases was good, without regard to whether it related to the business of that office or agency or not.

The question then remains, whether "the office or agency in a county," in the meaning of these sections, was intended to apply to such an agency or office as the proof shows that Ludlum conducted in Hamilton county. We think not. If this were a suit against a domestic corporation in a county other than the one of its principal office, we think it could not be held that the office or agency in Hamilton county, as shown by the proof, was such as to authorize the suit to be brought in that county and service to be had upon such agent. The office or agency in such cases would be held to mean, some office, agency or place of business located in the county. And if we apply the section to a foreign corporation, we cannot give it a broader construction.

It will be observed that the sections we are considering, apply not only to corporations, but to companies and individuals. It could not have been intended to authorize suits here against non-resident firms or individuals, by service upon their travelling agents. It was only intended to allow such suits where such non-resident firms or individuals, have an office or agency for the transaction of business located in some county in this State.

As we have seen, the defendant had no office or agency in Hamilton county, any more than upon same proof might be held to apply to any other point in the Southern States, where Ludlum might happen to "drum for passengers." We think this is not the meaning of these provisions. The charge of the circuit judge

is not very definite in its meaning, but it authorized the jury to construe the law differently, which they did.

The judgment is reversed.

Process cannot be Served upon Agent of Foreign Corporation casually in Jurisdiction.—Service of process upon the officer or agent of a railroad company who is merely casually present in the State does not constitute and never has been considered to constitute service upon the corporation. *Dallas v. Atlantic, M. & O. R. R. Co.*, 2 McArthur, 146; *Moulin v. Insurance Co.*, 42 Zab. (N. J.) 234; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Peckham v. Inhabitants of North Parish*, 16 Pick. 286; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 7; *Latimer v. Union Pac. R. Co.*, 48 Mo. 105; *Newell v. Great Western R. Co.*, 19 Mich. 336; *Barnet v. Chicago & L. H. R. Co.*, 4 Hun, 114; *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 378; *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr. N. S. 332; *St. Clair v. Cox*, 1 Am. & Eng. Corp. Cas. 19.

Process can Generally be Served upon Resident Agent only Carrying on Business.—It is only when the officer or agent is habitually in the State transacting the business of the corporation that process can be served upon him. *City Fire Ins. Co. v. Currugi*, 41 Ga. 671; *Weight v. Liverpool, etc., Ins. Co.*, 80 La. Ann. (II.) 1186; *Libby v. Hodgson*, 9 N. H. 394; *Kiufeko v. Merchants' Despatch Trans. Co.*, 3 McCrary C. Ct. 547.

THOMAS, Trustee,

v.

BROWNVILLE, FORT KEARNEY AND PACIFIC R. Co.

(*Advances Case, Supreme Court of the United States. December 10, 1888.*)

Where two of the board of directors of a railroad corporation, who took part in making a contract for the construction of the road, were interested with the other parties in the contract, and the other contractors, except these two, entered into an agreement with the other directors at the time the construction contract was made, that, in effect, relieved them from liability on their unpaid stock, such contract is voidable at the election of the parties affected by the fraud; but to the extent of the benefit conferred upon and received by the corporation in the construction of the road, the bonds issued in payment thereof are not void, and in suit to foreclose the mortgage by which they are secured a decree for that amount should be allowed.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

Wm. M. Ramsey for appellant.

J. H. Broady for appellee.

MILLER, J.—This is an appeal from a decree of the circuit court for the district of Nebraska dismissing appellant's bill for a foreclosure of a railroad mortgage. The mortgage was made by the Brownville, Fort Kearney & Pacific R. R. Co. to secure the pay-

ment of bonds issued by said company to certain persons who had contracted to build its road, and to whom 610 of said bonds of \$1000 each had been delivered. There was a default in the payment of these bonds. After they were executed and delivered the Brownville & Fort Kearney R. R. Co. became consolidated under the laws of Nebraska with the Midland Pacific R. R. Co., under the new name of the Nebraska Ry. Co. In the bill of foreclosure both these companies—that is, the Brownville Co. and the Nebraska Co.—are made defendants, and an answer confessing plaintiff's right to relief being filed, the court rendered a decree of foreclosure, and apparently a sale was had. But at this stage of the proceedings certain parties interested as stockholders of the original Brownville & Fort Kearney Co. were permitted to make themselves defendants, and the first decree was vacated. These parties set up by way of answer and cross-bill that the contract for the construction of the road, on account of which the bonds were issued, was fraudulent and void, and so were the bonds issued under it, and they resisted the foreclosure of the mortgage on that account.

The fraud charged in this answer and cross-bill is founded on two allegations: First. It is alleged that two of the board of directors who took part in making the construction contract were interested with the other parties in the contract. Second. That the other contractors besides these two made an agreement, at the same time that the construction contract was made, with twelve of the shareholders of the railroad company, that they would relieve them, as subscribers to the stock of said company, from the payment of any further assessments upon the stock which they had subscribed for, by paying out said stock and having same assigned to them; in all, not to exceed \$16,500 of the \$41,000 of individual subscriptions to said company. The names of the persons thus relieved by the construction company included all the directors of the railroad company at the time the contract for construction was made. As the stock was worthless, and these parties were liable to be called on to pay up this \$16,500, the effect upon the directors in making a construction contract with the men who relieved them of their liability, two of them being also parties in the construction contract, is readily seen. These allegations are proved beyond question, and the circuit court held the contract void, and the bonds issued in fulfilment of it also void, and dismissed the bill. We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. But as this court said in the case of *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction,—namely, the directors or trustees, or a majority

of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract,—that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is therefore at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity.

In the present case the stockholders of the corporation, whose officers accepted those benefits at the hands of the parties, with whom they were, in the name of the corporation, making a contract for over a million of dollars, do denounce and repudiate that contract. The conduct of these directors is utterly indefensible. The case of *Wardell v. Union Pac. R. Co.*, 103 U. S. 651; s. c., 1 Am. & Eng. R. R. Cas. 427, is in precise analogy to this. See, also, same case in 4 Dill. 330. The original contract being such that the contractors can maintain no suit on it, the bonds which they received are affected with the same vice, and cannot be enforced, unless they are negotiable instruments in the hands of innocent holders for value. This principle is set up and relied on to reverse the decree, on the ground that the bonds are in the hands of the Burlington & Missouri River R. R. Co. This company is no party to the suit, but it appears in evidence that, while it has possession of these bonds, it did not receive them by any purchase in the ordinary course of business. They came into their possession as part of a transaction in which they purchased the consolidated Nebraska Co.'s railroad, and these bonds were probably taken as security against their being used to injure the title. It is also shown that, as further security in the same direction, the Burlington & Missouri R. R. Co. yet retains \$400,000 of the price of the road, which they agreed to pay. Under these circumstances we do not see that that company is in a condition to avail itself of the doctrine of bona fide holders for value.

But we are asked to reverse the decree so far as to permit the trustee in this case to recover such a sum as the construction company actually earned in building the road. The matter was referred to a master, who, on this hypothesis, reported that the contractors had done work for the railroad company, which it had accepted, to the value of \$205,947.66 beyond what they had received payment for, except as it was paid by these bonds. He also reported that this work was of that much advantage to the company, and its value or cost is estimated as on a quantum meruit, without regard to the prices fixed by the contract. We are of opinion that appellant's view of this part of the transaction is sound. The bonds and mortgage in the hands of the trustee were issued in payment for this work. To the extent of \$205,947.66 the consideration is good, and no sound principle is seen on which they cannot to that extent be enforced. To this extent they do not rest on the original contract, but on work, labor, and material

actually furnished to the company and received by it. These services and materials are not estimated by the prices named in the contract, but by their real value to the company.

In the analogous case of *Wardell v. Union Pac. R. Co.*, 4 Dill. 339, the circuit court, after rejecting the fraudulent contract on the same grounds that we reject this one, said:

"By what rule shall we measure Mr. Wardell's rights? He has spent time and labor and money in discovering the mines, and in placing them in condition to be profitably worked. . . . Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation."

This ruling was affirmed in this court on appeal in the same case. 103 U. S. 659; s. c., 1 Am. & Eng. R. R. Cas. 427. See, also, *Gardner v. Butler*, 30 N. J. Eq. 702.

There is another principle of equity jurisprudence which leads to the same conclusion. The stockholders who have resisted complainant's claim were not parties to the original suit for foreclosure, nor were they either necessary or proper parties as the case then stood. The decree and sale were made in a suit where all the usual parties to such a suit were agreed. These stockholders had no legal right to interfere. It was only by permission of the court that they were allowed to come in and contest the validity of the mortgage. In doing this they became actors. They filed their cross-bill. In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other terms would be unjust, and would make the court the instrument of this injustice.

The decree of the circuit court must therefore be reversed, and the case remanded to that court, with directions for a decree in favor of the plaintiff for the sum of \$205,947.66, with interest. If a sale becomes necessary this sum must be paid out pro rata on the bonds secured by the mortgage, on their being produced and cancelled, or surrendered for cancellation, provided the road sells for so much.

Dealings of Directors with Corporation.—The dealings of directors with corporations are viewed by courts of equity with a suspicious eye. Directors are not allowed to make use of their position to secure any profit or advantage for themselves. In general it seems that courts of equity will set aside contracts between the corporation and its directors at the option of the stockholders. *Butts v. Wood*, 87 N. Y. 817; *Drury v. Cross*, 7 Wall. 299; *Terry v. Bank of New Orleans*, 9 Paige, 668; *Abbot v. American Hard Rubber Co.*,

88 Barb. 878; Ward v. Salem St. R. Co., 108 Mass. 382; Mahanoy Mining Co. v. Bennett, 5 Sawy. 141; European & N. A. R. R. Co. v. Poor, 59 Me. 277; Flint & Père Marquette R. R. Co. v. Dewey, 14 Mich. 477; Davenport Bank v. Gifford, 47 Iowa, 475; Hoffmann Steam Coal Co. v. Cumberland Coal and Iron Co., 16 Md. 456; Cumberland Coal and Iron Co. v. Sherman, 20 Md. 118; Koehler v. Black River Falls Iron Co., 2 Black, 715; Blair Town Lot, etc., R. R. Co. v. Walker, 50 Iowa, 376; York & Midland R. Co. v. Hudson, 16 Beav. 485; Luxembourg R. Co. v. Magnay, 25 Beav. 586; Aberdeen R. Co. v. Blaikie Bros., 1 McQ. 461; Wardell v. Union Pac. R. R., 1 Am. & Eng. R. R. Cas. 427; Thomas v. Brownville, etc., R. R. Co., 1 McCrary C. Ct. 392; Hopkin's Appeal, 90 Pa. St. 69; Little Rock & Ft. Smith R. R. Co. v. Page, 85 Ark. 304; s. c., 7 Am. & Eng. R. R. Cas. 36; Chouteau v. Allen, 70 Mo. 290; Davis v. Rock Creek, etc., Mining Co., 55 Cal. 359; Addison v. Lewis, 75 Va. 701; s. c., 9 Am. & Eng. R. R. Cas. 702; Bent v. Priest, 10 Mo. App. 543; Graham v. L. C., etc., R. R. Co., 1 Am. & Eng. R. R. Cas. 416; Barnes v. Brown, 2 Am. & Eng. R. R. Cas. 688; Mich. Air-Line R. R. Co. v. Mellin, 5 Am. & Eng. R. R. Cas. 245; Houston & T. C. R. Co. v. Van Alstyne, 9 Am. & Eng. R. R. Cas. 686; Duncomb v. New York, H. & N. R. Co., 4 Am. & Eng. R. R. Cas. 293; s. c., 13 Am. & Eng. R. R. Cas. 84; Metropolitan R. Co. v. Manhattan R. Co. et al., 15 Am. & Eng. R. R. Cas. 1.

Dealings not Prohibited Absolutely.—Such contracts and dealings are not, however, absolutely prohibited, and will be sustained when entered into in good faith. Hotel Co. v. Wade, 97 U. S. 113; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Stratton v. Allen, 16 N. J. Eq. 220; Railroad Co. v. Claghorn, 1 Speir's Eq. 546; Gordon v. Preston, 1 Watts, 385; Buell v. Buckingham, 16 Iowa, 284; St. Louis v. Alexander, 23 Mo. 488; Hallam v. Indianola Hotel Co., 56 Iowa, 178; Sims v. Brooklyn St. R. R. Co., 4 Am. & Eng. R. R. Cas. 132; Claflin v. South Carolina R. R. Co., 4 Am. & Eng. R. R. Cas. 281.

And where a corporation has virtually ceased to exist and is hopelessly insolvent, its officers may make proper arrangements themselves to carry on the business. Murray v. Vanderbilt, 39 Barb. 140; Ashurst's Appeal, 60 Pa. St. 290; Cumberland Coal Co. v. Parish, 42 Md. 508; Bradley v. Williams, 8 Hughes C. C. 26; Farmer's Bank v. Downey, 53 Cal. 466; Gindrat v. Dane, 4 Cliff. 360.

See also, for a full collection of authorities, Metropolitan, etc., R. Co. v. Manhattan, etc., R. Co. et al., 15 Am. & Eng. R. R. Cas. 1.

COOK et al., Executors,

v.

SHERMAN, Assignee, et al.

(Advance Case, U. S. Circuit Court, D. Iowa, C. D. May, 1882.)

Where the officers and directors of a railroad company enter into a contract to purchase lands and to locate the line of their projected road and its depots and stations on or near the lands so purchased, such a contract is contrary to public policy, and one which will not be enforced or made the basis of any relief in a court of equity.

16 A. & E. R. Cas.—36

Directors of a railroad corporation are quasi public officers; they occupy a position of trust and act in a fiduciary capacity; they represent the stockholders, and cannot acquire any interests adverse to them.

Where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief.

In a suit for fraud, the limitation prescribed by Rev. St. § 5057, does not begin to run until the discovery of the fraud; and, in an action against the assignee of a bankrupt, he will be chargeable with constructive notice of any concealment of the fraud by the bankrupt; and if the facts constituting the fraud were known only to the bankrupt, and were of such a character as to conceal themselves, no proof of actual concealment by the assignee is necessary.

Where several parties buy real estate, and the title is taken in the name of one of them for their joint benefit, with authority to sell the same and divide the proceeds, the party holding the title is a trustee, and he cannot purchase the interests of the others unless he makes a full and fair disclosure of all the facts, and enables them to deal with him on terms of perfect equality.

The rule respecting the rescission of a fraudulent contract immediately upon the discovery of the fraud, and the return of the consideration by the defrauded party, does not apply to a settlement of accounts between trustee and cestui que trust, in which the trustee, by concealing material facts, obtains a conveyance of the trust property for an inadequate consideration.

On final hearing.

In 1868 B. F. Allen and Ebenezer Cook, who were directors of the Chicago, Rock Island & Pacific R. R. Co., and John F. Cook made a verbal contract to purchase grounds for the company upon which to locate its stations between De Soto, Iowa, and Council Bluffs, and also for the purchase of lands adjacent to such stations, a part of which was to be laid out into town lots. J. F. Tracy, the president of the company, and E. H. Johnson, the chief engineer, were to have an interest in the profits, though not named in the contract. In 1870 this agreement was reduced to writing, and provided that Allen should advance the money to make the purchases, to be returned to him out of the money realized from the sale of the lands, with 10 per cent interest, the title to be taken in his name for their joint benefit, the lands sold by him, and the profits paid, one half to Ebenezer Cook, one fourth to Allen, and one fourth to John P. Cook. Allen sold some of the lands, and kept an account of his receipts and expenditures, but such account was disputed. John P. Cook sold his interest to E. E. Cook in 1871, and he and Ebenezer Cook having died, their legal representatives and heirs joining E. E. Cook as a party, instituted suits to set aside an assignment made to Allen in settlement of their affairs, alleging fraud and misrepresentations on the part of Allen. Allen having been adjudged a bankrupt, Hoyt Sherman, made defendant in the suits, was appointed his assignee, and afterwards made receiver in these cases. The facts alleged to constitute the fraud

were discovered August, 1878, and the bills filed, respectively, March 24, 1880, and May 10, 1880.

Wright, Cummins & Wright and Bills & Block for complainants.

Nourse & Kauffman for respondents.

McCARY, J.—In these cases the two most important questions to be considered are,—First, is the contract declared upon contrary to public policy so that no relief can be based upon it? and, second, if so, have the complainants made out a case for relief independently of the contract?

It clearly appears that Allen and Ebenezer Cook, who were directors of the Chicago, Rock Island & Pacific R. R. Co., and J. F. Tracy, the president, and Edward H. Johnson, the chief engineer, of that company, entered into an agreement into which John P. Cook was admitted as a party in interest, to purchase the lands in question in advance of the location of the line and of the depots and stations of said railroad, with a view to locating the same on or near such lands. Such a contract by officers of a railroad corporation is contrary to public policy, and one which will not be enforced or made the basis of any relief in a court of equity. The directors of such a corporation are quasi public officers. They occupy a position of trust and act in a fiduciary capacity. They represent, not themselves, but the stockholders. They are, in all their official actions, to consider, not their private interest, but that of the stockholders, whose property they manage and control. If, as in this case, they are directors of a railway company, with power to locate and construct a public highway, they owe a duty to the public as well as to the stockholders, and are therefore doubly bound to abstain from entering into any scheme to pervert their trusts to their private gain. The law does not permit these officials to subject themselves to any temptation to serve their own interests in preference to the interests of the stockholders and of the public.

If the courts should enforce such contracts they would lend their sanction to a practice the inevitable tendency of which is to encourage breaches of trust to the sacrifice of private rights and of the public interest. The managing officers of quasi public corporations, possessing vast powers and engaged in great enterprises, are too apt to forget that they are not to have any interest adverse to those whom they represent, and the courts of justice should not in the least relax the rule requiring of them scrupulous fidelity and entire impartiality in the discharge of their official duties.

The present case well illustrates the importance of the rule of law to which we refer. The parties interested in this contract controlled the location of the railroad and of its depots and station grounds.

After they had bought lands along the line, with a view to making money by the location of the line and of the depots and stations upon or near them, it needs no argument to show that they were utterly unfit and incompetent to decide as between a location upon their own lands and a location elsewhere.

It follows that the contract under consideration can neither be enforced nor made the basis of any relief whatever in a court of equity. The court will leave the parties to such a contract precisely where it finds them. *Marshall v. Railroad Co.*, 16 How. 314; *Bank v. Owens*, 2 Pet. 539; 2 Redf. Ry. 576-584; Pom. Spec. Perf. 284-286; *Wight v. Rindskopf*, 43 Wis. 344; *McWilliams v. Phillips*, 51 Miss. 196; *Guernsey v. Cook*, 120 Mass. 501; *Setter v. Alvey*, 15 Kan. 157; *Creath's Adm'r v. Sims*, 5 How. 204; *Bestor v. Wathen*, 60 Ill. 138; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169.

This brings us to the consideration of the second question, which is, have the complainants shown themselves entitled to relief independently of the illegal contract? It has been decided by the Supreme Court of the United States that "where several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one of such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483:

The rule upon this subject is accurately stated in the last-named case, as follows:

"But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiff,—the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them."

According to this rule, the question in such cases must always be, can the plaintiff maintain his action without enforcing the illegal contract? or, in other words, has he a cause of action independently of the illegal contract? If it appears that the defendants in a given case have received money or property from the complainants, and which belongs to the latter, the same may be recovered without any inquiry into the nature of the contract under which such money or property was acquired. The distinction is between enforcing an illegal contract and asserting title to money and property which has arisen from it. Applying this rule, we have no difficulty in

holding that the complainants in the case last above named cannot recover.

It does not appear that Ebenezer Cook ever contributed any money, property, or services towards the acquisition of the property in question. His representatives, therefore, have no right which can be enforced without the aid of the illegal contract. As to them, the bill, in effect, is a suit to enforce the contract by decreeing a division of profits in accordance with its terms. It follows that the bill in that case (No. 1779) must be dismissed.

As to the other case there is more difficulty. The evidence does show that John P. Cook contributed his services, and probably, also, he expended some money to acquire the property in question. His representatives, therefore, are, upon the principle above stated, entitled to an accounting, and to receive from the joint account such sum as he would have been entitled to by reason of those contributions, unless the suit is barred by law or by reason of the laches of the complainants.

It is insisted that the suit is barred by the two-years limitation provided by section 5057 of the Revised Statutes of the United States, which requires that all suits at law or in equity against an assignee in bankruptcy, touching any property or rights of property transferable to or vested in such assignee, shall be brought within two years from the time when the cause of action accrued. It will be borne in mind that this suit is brought to set aside for fraud the release executed by complainants to Allen, as well as to recover the complainants' share in the joint account. The suit was not brought within two years from the execution of said release, but we think the proof shows that it was brought within two years from the time when the complainants discovered the facts. If the facts were such as to render the transaction fraudulent, then the statute did not begin to run until they were discovered. *Bailey v. Glover*, 21 Wall. 342.

In that case it was held that the statute above referred to is a statute of limitation precisely like other statutes of limitation, and that in construing it we are to apply the rule that, where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.

Without discussing at length the question of fact presented, we hold that the release was obtained by Allen under circumstances which renders it fraudulent and void. The relation which existed between the parties was one of trust and confidence. The title was vested in Allen, to be held for the use and benefit of the other parties in interest. He was advised as to the situation and value of the property, and as to the state of the joint account. He was bound, therefore, to make a full and fair disclosure of all the facts so as to enable the other parties to deal with him upon terms of

perfect equality. He seems to have assumed, on the contrary, that he was at liberty to make the best bargain possible for himself. He did not accurately state to them the condition of the joint account, or the amount of his claim against the same, and by his actions and words he led them to believe that it was extremely doubtful whether any profit could be realized out of the transaction, and in this belief they executed the release. It must therefore be held to be fraudulent and void.

The complainants did not discover the facts constituting this fraud until within less than two years from the time of the commencement of this suit. It is insisted by counsel for respondents that the statute does not apply to this case because the assignee in bankruptcy, who pleads the limitation, is not charged with the commission or concealment of any fraud. It is said that the rule applies only to a case where the party pleading the statute is himself guilty of a fraud, which he has concealed, and that therefore it does not apply to the assignee. While the general rule is, no doubt, as stated, it does not follow that a distinction in this respect can be made between the bankrupt and his assignee. For the purposes of the statute of limitations they must be treated as one person. The assignee takes the place of the bankrupt. If, by reason of the fraud of the bankrupt, the two years' limitation had not commenced to run at the time of the bankruptcy, it did not begin to run by reason alone of the transfer of the estate to the assignee. The question in every such case must be, did the fraud continue to be unknown to the plaintiff after the appointment of the assignee, without any negligence or laches on the part of plaintiff? If, indeed, the fraud of the bankrupt was of such a character as to require special efforts on the part of the assignee to keep it secret, so that but for such efforts on his part the plaintiff must have discovered it by reasonable diligence, then it might be necessary to show affirmative acts of concealment on the part of the assignee; but if the facts constituting the fraud were known only to the bankrupt, and were of such a character as to conceal themselves, no proof of actual concealment by the assignee is necessary. The assignee himself may be ignorant of the fraud, as in most cases it is to be presumed he would be, yet he represents the bankrupt, stands in his shoes, and is charged with constructive notice of his fraudulent acts. If it were otherwise, the bankrupt might, by concealing even the grossest frauds for two years from the assignee, as well as from others, be enabled to consummate them. We hold, therefore, that it is not necessary to show in this case affirmative acts of concealment on the part of the assignee. As we shall presently see, the facts constituting the fraud on the part of the bankrupt, or at least a material part of them, were such as to conceal themselves.

It is also insisted that this case does not fall within the rule laid

down in the case of *Bailey v. Glover*, because the fraud was not concealed by any affirmative acts of Allen. Is it true that complainants are bound to show such affirmative acts? The rule upon the subject by which we must be governed is thus stated in the opinion of the court, pronounced by Justice Miller, in *Bailey v. Glover*:

“ We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.”

In this case, as we have already seen, the fraud was committed by a trustee against his cestui que trust by failing to make a full disclosure as to the state of the joint account, and as to the value of the joint estate. The proof shows, as we have already said, that the facts as to the state of the accounts were exclusively within the knowledge of Allen; and it is apparent, also, that as to the location, character, and value of the lands he had far better means of knowledge, and doubtless much more accurate information, than any other of the parties in interest. In fact, after the death of John P. Cook, the parties in interest, aside from Allen, had little or no information upon the subject.

In view of the relation existing between the parties, we are of the opinion that the complainants were at liberty to rely upon the representations of Allen as to the value of the lands acquired under the contract, without visiting and examining the lands, or investigating for themselves the question of their actual value. But a further and more conclusive answer to this suggestion is to be found in the fact that the misrepresentations and concealments by means of which the release was obtained did not relate exclusively to the value of the lands, but had reference in part to the joint account, the amount of Allen's claim against the same, and the balance in his hands for distribution, all being matters exclusively within Allen's knowledge, and concerning which the complainants were obliged to rely upon him. The amount of Allen's claim against the joint account was largely overstated by him, and the quantity of land sold and the sum realized from sales by him was largely understated, as was also the amount of bills receivable held by him. These matters of themselves were sufficient to render the transaction null and void, without reference to the representations made concerning the value of the lands, and they are manifestly matters which could not be discovered so long as Allen chose to conceal them. In other words, they constituted a fraud which was of such a nature as to conceal itself.

It is insisted that the complainants, or some of them, had infor-

mation more than two years before the commencement of this suit, which was sufficient to put them on inquiry and charge them with notice of the fact. The proof is that E. E. Cook heard Thomas F. Withrow remark, more than two years before the commencement of this suit, that Allen had defrauded or swindled the other parties in interest; but the remark was made in a casual way. No particulars of any alleged fraud were given, and Cook, having strong faith in Allen's integrity, might well have disbelieved and disregarded the statement. There is nothing to show that his confidence in Allen was shaken by the remark, and, if not, he was not called upon to act upon it. We hold that the suit is not barred by the statute.

Another question of some difficulty arises in this case. It is whether the complainants were bound, immediately upon the discovery of the fraud, to give notice of rescission and to offer to return the consideration for the release, within the principle of *Grymes v. Sanders*, 93 U. S. 62. After much consideration we have reached the conclusion that the doctrine of that case does not apply here. The transaction which we are now considering was not a contract of purchase and sale in the ordinary sense, but it was a settlement between a trustee and his cestui que trust. Allen, as trustee, held certain money and property belonging to complainants; the complainants had received some money and property on account. Upon settlement it was agreed that Allen should hold all in his hands, and complainants should keep what they had themselves. Nothing was actually paid. The complainants kept in their possession what they had previously received. In such a case there was nothing to return, and the reason for prompt rescission and return of the consideration does not exist. It is enough if the party defrauded in such a settlement, upon bringing a suit to set it aside, avers a willingness to be charged with the sum in his hands. It would be an idle and useless proceeding to require him to pay it over to the trustee and immediately decree its return to him. We do not think that the doctrine respecting the rescission of a fraudulent contract upon the discovery of the fraud, and the return of the consideration received by the defrauded party, applies to settlements of accounts between trustee and cestui que trust under the circumstances of the present case. See *Elfelt v. Hart*, 1 McCrary, 11.

It may be said that, in order to hold that Allen was a trustee for John P. Cook with respect to the services or property put into the joint account by the latter, it is necessary to take notice of the provisions of the illegal contract, and that this court cannot do. A sufficient answer to this suggestion is that while the illegal contract cannot be enforced or made the basis of relief, there is nothing in the law of evidence, or in the principles of equity, to prevent its being considered as evidence in a case between the parties to it,

and as defining their relations to each other with respect to the property acquired under it. As evidence, the contract may be competent as tending to show the right of plaintiff to recover independently of any contract rights conferred by it.

The result of these views is that there must be a decree in this case setting aside, as fraudulent and void, the release, assignment, and conveyance executed by the executors of John P. Cook, and the said Edward E. Cook individually, to said B. F. Allen, of their respective interests in the joint account and property, and for an accounting, to the end that the complainants may recover to the extent of the value of the services rendered and money contributed by John P. Cook to the joint account; and for the purpose of ascertaining the sum to which they are entitled, this case will be referred to a master for such accounting and for report.

A question may arise as to the proper measure of damages. Can complainants recover upon the basis of the contract, or only for the value of the services, etc., contributed by him to the joint account? We do not decide this question now, but will direct the master to report the sum that would be due upon each hypothesis, reserving the question until the final hearing.

Officer making Fraudulent Use of Position.—It is well settled, both on principle and authority, that the officers of a company occupy towards it a fiduciary capacity, and cannot lawfully make use of their position to enter into contracts whereby they secure to themselves personal advantages. *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Aberdeen Ry. Co. v. Blackie*, 1 Macq. 461; *York Buildings Co. v. Mackenzie*, 3 Paton, H. L. 378; *Koehler v. Black Riv., etc., Co.*, 2 Black, 715; *Cumberland Coal Co. v. Parish*, 42 Md. 598; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485; *Covington, etc., R. Co. v. Bowler*, 9 Bush, 468; *Port v. Russell*, 36 Ind. 60; *Cook v. Berlin, etc., Co.*, 48 Wis. 438; *Harts v. Brown*, 77 Ill. 227; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 505; *Rice's Appeal*, 79 Pa. St. 168; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Levisse v. Shreveport, etc., Co.*, 27 La. Ann. 641; *Austin City R. Co. v. Swisher* (Tex. Ct. App.), 15 Reporter, 760; *Wardell v. Union Pacific R. Co.*, 108 U. S. 651; s. c., 1 Am. & Eng. R. R. Cas. 427; *Thomas v. Brownville, etc., R. Co.*, 109 U. S. 522; s. c., with note supra; *Gallery v. Nat. Exchange Bank*, 41 Mich. 169; *Metropolitan, etc., R. Co. v. Manhattan, etc., R. Co.*, 15 Am. & Eng. R. R. Cas. 1.

UNION PACIFIC R. R. Co.
v.
CREDIT MOBILIER OF AMERICA.
(185 *Massachusetts Reports*, 367.)

A bill in equity, brought by a railroad corporation against a construction company, to restrain an action at law, brought by the company against the corporation, to recover sums of money alleged to be due for building its railroad, can be maintained only on the equity which the stockholders in the corporation have, if the bill proceeds upon the ground that the work was done under a contract entered into by the corporation with an irresponsible person, through the fraudulent procurement of the managing director of the corporation and for his personal benefit, which contract was assigned to the construction company, with the assent of the directors of the corporation, many of whom were interested in the construction company, although there are creditors of the corporation, and among them is the government which granted its charter.

By the terms of the charter of a railroad corporation, the subscription books were to be kept open until \$100,000,000 should be subscribed, and persons were to be allowed to subscribe at a late date on the same terms with the earlier subscribers, and one hundred miles of railroad were to be built within a certain time. Capitalists were unwilling to risk their money in the construction of the railroad, if others, after success was assured, could share the profits equally with themselves. The managing director of the corporation procured an irresponsible person to offer to construct a portion of the railroad, and procured the directors to accept the offer on behalf of the corporation. The managing director furnished this person with means to carry on the work, and took to himself the profits of the enterprise. He also had an agreement with this person, by which the contract should be assigned to such person as he should direct. The managing director intended that, if the scheme could be carried out, all of the stockholders of the corporation would have an opportunity to become interested in it, in proportion to the number of their shares of stock. Subsequently, a construction company was chartered, in which the managing director and other directors of the corporation were largely interested, and which had as its directors some of the directors of the corporation; the contract already made was assigned to this company with the assent of the directors of the corporation, and an opportunity was given to all the then stockholders of the corporation to become members of the company, and the road was built by the company. *Held*, on a bill in equity, brought by the railroad corporation against the construction company to restrain the prosecution of an action at law brought to recover sums of money due for building the road, that the managing director did not stand as to the contract procured by him in the relation of an undisclosed principal. *Held*, also, no actual fraud being found to exist, that the above facts did not show constructive fraud, so as to render the contract void in the hands of the construction company.

BILL in Equity, filed April 10, 1876, to restrain the defendant, a corporation chartered by the State of Pennsylvania, from the prosecution of an action at law by the present defendant against the present plaintiff, and now pending in this court, upon an

account stated between the two corporations on March 28, 1867, for the sum of \$1,994,769.96; for the additional sum of \$268,850.17, alleged to be due on September 11, 1868; and upon a promissory note for \$2,000,000, given by the present plaintiff to the present defendant in partial settlement of said account, and dated August 4, 1869.

Hearing, upon the pleadings and evidence, before Endicott, J., who reserved the case for the consideration of the full court.

S. Bartlett and F. Bartlett for the plaintiff.

W. G. Russell and G. Putnam (G. F. Betts with them) for the defendant.

C. ALLEN, J.—This case is submitted to us upon the pleadings and a report of the whole evidence taken; without any finding of facts by the judge before whom it was heard.

Upon the pleadings, the plaintiff's case must depend upon the equity of its stockholders. It has, indeed, been suggested in argument, that the bill may be maintained on the equity of creditors. It appears incidentally in the course of the evidence that the government lent its security to the Union Pacific R. R. Co., to aid in the construction of the railroad; and that other indebtedness exists. But this is no substantive part of the plaintiff's case. The bill does not purport to be brought in the interest of the government, or of creditors; but it is made to rest expressly upon the equity of stockholders. Neither party contends, or admits, that any violation of the charter of the Union Pacific R. R. Co., or of its duty to the government, was involved in the transactions set forth. Both parties, indeed, at an earlier stage of the case, have united in a statement, and in an elaborate argument, to the contrary. The bill contains no averment whatever of any indebtedness of the plaintiff; and, of course, there is no statement of how much is due to creditors, and how much it is necessary to realize in order to supply any deficiency of other means and resources of the plaintiff to make such creditors whole. In considering the case, therefore, the equity of the plaintiff corporation, in behalf of its stockholders, as against the defendant corporation, is alone to be considered.

It is also to be borne in mind that the relief sought for is founded upon the money and securities averred to have been received by the Credit Mobilier under the Hoxie contract, after its assignment to the defendant. There was testimony to the effect that, prior to such assignment, certain profits were realized under this contract by one Durant; but he is not a party to the suit, and no consideration need be given to the question of what rights the plaintiff might have as against him, except as this may affect the further question of its rights as against the defendant.

The facts, upon which the determination of the case must

depend, not having been found by the single justice, it is expedient, in the first instance, to state the material facts, as they are found by us to exist, upon the evidence which has been introduced.

The Hoxie contract, so called, and other formal papers relating thereto, were as follows: By a proposition dated August 8, 1864, addressed "to the President and Committee on Contracts of the Union Pacific R. R. Co.," and signed "H. M. Hoxie, by H. C. Crane, attorney," Hoxie proposed to enter into a contract to build and equip one hundred miles of railroad and telegraph, commencing at Omaha, according to certain specifications and upon certain terms and conditions. Appended to this proposition was a paper addressed to Hoxie, and signed "George T. M. Davis, Special Committee," as follows: "H. M. Hoxie, Esq., Dear Sir: You will please to go on with the work, under the above proposition, and, if the company do not accept it before the first day of October next, they will pay you upon the same terms and conditions for what work may be done, as shown by the estimates of the engineers, made as provided in this proposition, first giving you thirty days' notice that they do not accept. George T. M. Davis, special committee."

Underneath this paper was the following: "September 23, 1864. Above contract is approved and ratified. John A. Dix, C. S. Bushnell, George T. M. Davis."

The following additional papers were also executed between the same parties. "New York, October 4, 1864. To the President and Executive Committee of the Union Pacific R. R. Co. On condition that your railroad company will extend my contract from its present length for one hundred miles, so as to embrace all that portion of the road between Omaha and the one hundredth meridian of longitude, I will subscribe, or cause to be subscribed, for five hundred thousand dollars of the stock of your company. Respectfully yours, H. M. Hoxie, by H. C. Crane, attorney.

"The above proposition is hereby accepted for and on behalf of the Union Pacific R. R. Co. John A. Dix, C. S. Bushnell, Geo. T. M. Davis, special committee. October 3, 1864."

At these dates, there were twenty-eight directors and two government directors of the Union Pacific R. R. Co., and an executive committee consisting of Dix, Bushnell, Davis, and four others. Dix was president and Durant was vice-president of the corporation. There was no evidence of the extent of the authority conferred upon the executive committee, or of the existence of any committee known as the committee on contracts. The bill, however, alleges that the proposition of August 8th was accepted by a committee of the board of directors of the Union Pacific R. R. Co. on the 23d of September, 1864, and that the subsequent proposition of October 4, 1864, was accepted by a committee of

said corporation by a writing bearing date the third day of the same month of October; and the answer admits that said propositions were accepted by the plaintiff, at or about the dates alleged in the bill.

On October 5, 1864, a new board of officers was elected, with fifteen directors and five government directors, and an executive committee of seven. With one exception, the fifteen directors thus chosen were members of the former board; with two exceptions, the executive committee remained the same as before, including Dix, Bushnell, and Davis; Dix continued president, and Durant vice-president.

By a paper dated September 30, 1864, and executed at about that date, an agreement was made between Hoxie, for himself and as agent, and Durant, for the assignment of the contract for the construction of the one hundred miles of railroad and telegraph to Durant, or any party or parties he might direct. A paper dated October 7, 1864, was drawn up for signatures, at about the time of its date, reciting the last-mentioned paper, and providing that the subscribers agreed to take an interest in the Hoxie contract to the extent set opposite their respective names. This paper was signed by Durant and others, but was not fully carried out, as hereinafter stated.

On or about March 15, 1865, various papers were executed as follows:

1. A letter from Hoxie, by H. C. Crane, attorney, to the president and directors of the Union Pacific R. R. Co., consenting to their terminating the contract for building one hundred miles of railroad.

2. An agreement between Hoxie and the Credit Mobilier, by which Hoxie assigned to it his contract with the Union Pacific R. R. Co., and the Credit Mobilier agreed to execute to said company a guaranty of the performance thereof, and to indemnify him from all claims under the same.

3. A guaranty of such performance, executed by the Credit Mobilier to the Union Pacific R. R. Co.

On April 6, 1865, the board of directors of the Union Pacific R. R. Co. passed a resolution, accepting and recognizing the said assignment and guaranty, and ordering them and the Hoxie proposition or contract to be recorded in the directors' book of minutes. Another resolution was also adopted on the same day, that additional surveys and contracts for construction should be made as fast as the means of the company would properly justify.

Prior to the passage of these votes, Durant had proceeded with the work under the Hoxie contract, and taken to his own use such profits as arose therefrom. No other contracts were put in evidence; and the Credit Mobilier, after these votes, proceeded to build the railroad and telegraph, not only for the distance of one

hundred miles, but to the one hundredth meridian, a point two hundred and forty-seven miles west from Omaha.

Assuming, without deciding, that the papers constituting the Hoxie contract were signed in such form and by such officers as to bind the Union Pacific R. R. Co., said contract was made and entered into with the expectation and understanding that Hoxie would assign it to Durant, or to such party or parties as he should designate. This understanding on Durant's part was with the view and in order that, if the scheme could be carried out on that basis, all the stockholders of the Union Pacific R. R. Co. should have an opportunity to become interested in it, in proportion to the number of their shares. From the terms of the charter, it was thought impossible to raise money enough to build the railroad by inducing capitalists to subscribe to the stock. Subscription books were to be kept open until \$100,000,000 should be subscribed; and persons were to be allowed to subscribe at a late date, on the same terms with the earlier subscribers. Capitalists were unwilling to risk their money in the construction of the railroad, if others, after success should be assured, could step in and share the profits equally with themselves. It was sought, therefore, to adopt some plan by which the necessary funds could be raised, on terms which were considered more just, and which would induce stockholders and others to be willing to embark with additional capital in the enterprise. Accordingly Durant, nominally the vice-president, but in fact the principal officer of the corporation, hit upon the method of making the Hoxie contract for the construction of a portion of the railroad beginning at Omaha, with the understanding that the contract should be under his control, and should be assigned as he might direct; and the papers of September 30 and October 7, 1864, were accordingly drawn up, for the purpose of carrying out this understanding.

The foregoing facts do not in our view constitute Durant an undisclosed principal in the contract, in any such sense as to show that he was the actual contractor instead of Hoxie. He could not have been held responsible as principal. The understanding and expectation that the contract should be assigned as he might direct did not have the effect to make him a principal. For the time being, Hoxie was the party, and the only party, bound to the Union Pacific R. R. Co. for the performance of the contract; and Durant, while not personally bound upon it, nevertheless had the practical control of it, and, so far as Hoxie was concerned, might use that control either for his own benefit, or for the benefit of the stockholders. It is quite immaterial whether Hoxie had knowledge of the persons who would probably become interested in it after it should be assigned.

In point of fact, an opportunity was offered to most of the stockholders of the corporation, and to others, to become parties to

the agreement of October 7, 1864; but, though it was formally and ostensibly signed by Durant and others for the full amount specified as necessary, the parties were unwilling to carry it out on that basis, and the necessary money could not be raised, on account of the danger of personal liability.

It does not appear to be necessary to make a final determination whether every one of the stockholders of the Union Pacific R. R. Co. had actual knowledge of the plan by which it was hoped to carry on the work under the Hoxie contract, prior to the assignment to the Credit Mobilier. That plan was abandoned as impracticable. It may have been found to be so, before all the stockholders were consulted as to the details. The testimony of Opdyke is to the effect that he has no recollection of being informed of some of the details. He appears to have been aware of the existence of the papers constituting the Hoxie contract, but thinks the contract was never regarded as binding on the company till after the votes of April 6, 1865. During all the intermediate time, he says, it was a subject of anxious discussion, in the board of directors, how to raise the funds requisite for the construction of the railroad, and all the directors felt that the stockholders should share in the profits of the construction. Various plans were suggested and considered by the board, and the assistance of able legal counsel was not wanting; and at last the discussions resulted in the formation of the Credit Mobilier, and in the plan which was finally adopted, by which it was considered that the desired objects could be accomplished.

When this plan was adopted, all the existing stockholders of the Union Pacific R. R. Co. had an opportunity to take their proportionate number of shares in the Credit Mobilier. There was no unreasonable delay in arranging matters, nor any concealment of the Hoxie contract, or of the understanding or purpose with which it was made, from officers or stockholders of the Union Pacific R. R. Co., nor any complaint made by Opdyke, or any other person interested in that company, that any part of the arrangement was unreasonable or unfair. It is proper to look back to the state of things then existing. It was a time of war; the Union Pacific R. R. Co. had neither funds nor credit; subscribers to its stock could not be obtained; by the terms of its charter it was bound to finish one hundred miles of railroad by June 23, 1866, in order to prevent a forfeiture; and the directors were most anxiously engaged in devising and considering methods by which money enough could be raised to keep the company alive. The arrangement with the Credit Mobilier was the result of a most protracted discussion and deliberation, in which it is fair to assume that all of the directors of the company took part. It was thought, apparently on all hands, to be the best plan which could be adopted under the circumstances. The Hoxie contract was assigned; the

Credit Mobilier guaranteed its performance; the Union Pacific R. R. Co., by its directors, then, if not before, recognized and adopted it; and all this was done without objection on the part of any person interested. If before that time any individual or peculiar benefits could be secured under the Hoxie contract, it was to be so no longer. In the future, at all events, all the stockholders could avail themselves of its advantages and profits, upon equal and proportionate terms, and without risk of personal liability.

It is urged, on behalf of the Union Pacific R. R. Co., that actual fraud and circumvention were used in procuring the assent of the corporation to a contract grossly excessive and disadvantageous to its interests, for the benefit of Durant, by obtaining from Dey, the chief engineer, false estimates of the cost of the work, and using the same in making the contract. The proof of actual fraud rests mostly upon Dey, who testifies to making an inflated estimate of cost for Durant, and by his direction.

Actual fraud depends upon the purpose and intent. It is said that the price was too high. But if so, and if it was designed to allow stockholders to participate in the profits, the high price does not of itself show that the transaction was fraudulent. Without now dwelling at all upon reasons why the price might naturally be made high, the stockholders who should become interested in the contract would have small occasion to complain, however it might be with the government, or with other creditors. There is no direct testimony that any director of the Union Pacific R. R. Co. was misled, by the use of an inflated estimate of cost, into making or approving of the contract. While it is no doubt true that such fraud may be established by indirect or circumstantial evidence, we do not find sufficient proof of it, upon a perusal of all the testimony bearing upon the question. The purpose with which the contract was made does not appear to have been fraudulent. No evidence is introduced to show that any director of the company ever complained of having been misled. The votes of April 6, 1865, were passed about four months after Dey had sent in his resignation, expressing as his reason that he did not approve of the contract; and some time after he had been in further correspondence relating to the subject with Dix and with one of the government directors, Williams, in which, it is obvious, he had presented his objections to the contract. Apparently he was not aware of the arrangements or plans for allowing stockholders to become interested in it. The government director, however, as well as the president of the company, was put upon inquiry, under such circumstances that it is reasonable to suppose that adequate attention was given to the facts attending the making of the contract, and that it was not deemed expedient at the time to make any movement in the direction of modifying its provisions; and

that the price, though high, was nevertheless intelligently sanctioned and ratified by the formal votes of the directors, after being put upon inquiry, and making all the investigation which they wished to make. There was no occasion for Dey to be informed promptly of the business arrangements or plans of the directors, and the fact of his ignorance of them raises no presumption of fraud. And on the whole, and without dwelling in detail upon all the facts in evidence—taking into view the purpose and object with which the contract was made; the lack of concealment of this purpose and object; the omission of direct or indirect evidence to show that any officer or stockholder ever made complaint of having been misled;—the fact that Dey, a dissatisfied man, was in correspondence with the president and with a government director of the railroad company, and expressed his objections to the contract, and apparently sought to prevent its ratification by the company;—and the final votes of April 6, 1865, and the subsequent action thereunder, without objection or complaint from Dix, Williams, Opdyke, or any other source;—we have come to the conclusion, upon this question of fact, that the charge of actual fraud is not sustained.

The question remains, whether the present bill can be maintained on the ground that the contract was fraudulent by construction of law. This also depends largely upon the purpose with which the contract was made, and also upon that with which it was afterwards carried out. It has already been shown that Durant's position was not that of an undisclosed principal to the contract. It is not to be doubted, however, that an arrangement in form like that made in the present case, by which a third party is put forward as the principal contractor, may be constructively fraudulent, if the design is thereby to secure to a director of the corporation a separate and peculiar benefit to himself, and if that design is carried into execution. We have no disposition to relax the strictness of the wholesome rules which prevent the managers of corporations from using their official positions as a means of personal profit to themselves. But where a contract is entered into between a corporation and a third person, and the control of it secured by a director of the corporation, for a purpose like that which we have found to have existed in the present case, and where that purpose has subsequently been carried out by an assignment of the contract to parties who have executed it in good faith, the circumstance that it was originally procured to be entered into by a director will not have the effect to render it fraudulent by construction in the hands of such assignees, or to enable the corporation to reclaim moneys paid under it, or to maintain a bill in equity to restrain the prosecution of an action at law for a note given in payment for work done under it.

It is contended that there was an original inherent vice or taint

in the contract, which remains even after such assignment; that there was not such a substitution of a new party as to constitute a novation; and that the assignees stand on no better ground than the assignor. It is, however, to be observed, that, in any instance, a contract of a corporation with its officer is not absolutely and *ipso facto* void; but it is voidable. The corporation may perhaps disclaim it, if it chooses to do so. If the contract, however, proves to be a profitable one for the corporation, the corporation may hold the contracting officer to its performance. He cannot escape responsibility, though the corporation may. It is not accurate to say, in such case, that the contract becomes valid by reason of the ratification by the corporation. No ratification is necessary. The contract stands, unless avoided or repudiated. So long as the contract is held under the control of a director or officer, for his own benefit, it may well be conceded, so far as the determination of the present case is concerned, that the corporation may repudiate it at will. But if the reason for such repudiation has ceased, on account of an assignment to a new party, who at the request of the corporation guarantees its fulfilment, a technical ratification is not necessary. The contract then stands by its own force, there being no longer a right of repudiation.

In the present case, upon the facts which we have found to exist, there was no such original vice or taint in the contract itself, or in the purpose for which it was designed ultimately to be used, as to render it fraudulent by construction of law. If this purpose was in any respect departed from by Durant, either before or after it was possible to carry it out fully, or if he sought in any respect to exercise for his own benefit his practical control over the contract, or if he realized (as the testimony tends to show that he did) any peculiar benefits or profits from it before its assignment to the Credit Mobilier, the rights of the plaintiffs as against him in respect to such transactions are not involved in the case before us, and cannot be now determined. But when Durant exercised such practical control over the contract by procuring an assignment of it to the Credit Mobilier, in accordance with the plan which had been settled on by the Union Pacific R. R. Co., upon a full discussion and consideration of the best practicable methods for constructing its railroad, and after being put upon inquiry and making all the investigation which they cared to make, the element of a possible constructive fraud by an improper use of the contract disappeared.

If the contract had been originally made, without actual fraud, on the 6th of April, 1865, directly with the Credit Mobilier, it is plain that it could not now be avoided by the plaintiff. The fact that some directors were common to both corporations, and that Durant and others had large interests in both, would not render the contract invalid, as matter of law. It would be neces-

sary to show in addition an actual fraudulent intent; and this inference would be effectually repelled by the circumstance that all the stockholders of the Union Pacific R. R. Co. had an opportunity, and were invited, to become stockholders in the Credit Mobilier, on fair terms, and by the other facts and circumstances existing at the time. The element of a peculiar personal advantage to any officer of the plaintiff company would thus be removed. Whenever this element does not exist, the rule of constructive fraud, if applied, would be merely an arbitrary one; and whenever such peculiar personal advantage ceases to exist, the chief reason for the application of the rule also ceases.

Assuming it to be true that there was not such a substitution of parties as would constitute a technical novation, the fact remains that nobody but Hoxie was bound by the contract for the construction of the specified portion of the railroad. He was notoriously without adequate means to make his promise valuable. The Credit Mobilier took an assignment of all his rights under the contract, and executed to the Union Pacific R. R. Co. a guaranty for the performance of it; Hoxie, it is true, remained personally liable on his agreement, but he had parted with his interest in it, and in actual effect his position became like that of a surety; his interest in the contract was gone, and his only relation to the Union Pacific R. R. Co. consisted in his personal liability for the performance of the contract which he had assigned, and which the Credit Mobilier, for its own benefit, had assumed and undertaken to carry out. Durant was never personally liable upon the contract, and his only relation to it was, at the most, as the party receiving for the time being what came from the Union Pacific R. R. Co., as compensation for the work and materials for which he furnished the means. This relation was abandoned by the assignment to the Credit Mobilier. There was a complete substitution of the latter corporation for Durant, in all the relation in which he ever stood to the contract, or to the plaintiffs under the contract. Thereupon, with full knowledge of all the facts, or at least with all such knowledge as they cared to have, the directors passed the votes of April 6, 1865, which created the Hoxie contract, or gave effect to it, or recognized it as valid from and after that date. The object which the directors had at heart appeared to be then accomplished. The scheme thus adopted would in their opinion prove safe and attractive to capitalists, and also afford to all the stockholders an opportunity to participate in the profits of the work under the contract on fair and equal terms. If before that time there had been any peculiar or special benefit to any individual, it was to be so no longer. So far as the future was concerned, every provision was made for securing alike the success of the work and justice to all the stockholders that the most anxious foresight could devise. Under this state of facts, no

wholesome or reasonable rule of policy is violated or impaired, by holding that a contract so made, for such a purpose, and so assigned in order the better to carry out that purpose, cannot be avoided by the corporation as against the assignee, after it has been executed by the latter, without complaint or objection on the part of the corporation, or of any of its stockholders. Rules and maxims are not to be applied contrary to their true intent and spirit.

We are all of opinion, upon the facts found, that the case does not call for the application of the rule as to constructive fraud, which in a proper case we should not hesitate to enforce with strictness; but that the contract, from and after the votes of April 6, 1865, is to be treated as valid, between the Union Pacific R. R. Co. and the Credit Mobilier, and free from any taint or vice impairing its efficacy.

Bill dismissed.

SACALARIS

v.

EUREKA AND PALISADE R. R. Co.

(*Advances Case, Nevada. November 24, 1884.*)

Courts will take judicial notice of the authority of the managing officer of railway corporations such as a superintendent, and presume that such officer has power to conduct its ordinary business transactions.

An agent having oversight and charge with the power to direct, has a general and discretionary power within the scope of his agency.

Declarations of an agent made in the course of the transaction out of which the action arose are admissible in evidence against his principal.

Where the evidence in regard to a fact in issue is conflicting, the jury should determine such fact, and with their determination the court will not interfere.

Owner of personal property is not estopped from asserting his rights thereto, as against a purchaser from one having the ostensible ownership, if such purchaser had notice of his title.

APPEAL from a judgment of the sixth judicial court, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action to recover the possession of certain wood, converted by the defendant to his own use, or the value thereof. The further facts appear in the opinion.

Wren & Cheney for the appellant.

G. W. Baker and R. M. Beatty for the respondent.

BELKNAP, J.—Plaintiff was the owner of a quantity of cord-wood in the vicinity of the town of Eureka. He contracted with one Paquin to haul the wood to the town, and agreed to pay him one half of the wood he should haul for his services. Accordingly, Paquin hauled four hundred and sixty-four cords of wood. Fifty cords of this wood were deposited in the immediate neighborhood of the depot of defendant, eighty-five cords at a point in the town called "the Chinese wash-house," and the remainder (with which we are not concerned) at other places.

These two lots of wood were the property of the plaintiff, but defendant contends that it purchased them from Paquin under circumstances creating an equitable estoppel against further claim of ownership upon the part of plaintiff. This contention is resisted as to the eighty-five cords, upon the ground that defendant had notice of plaintiff's claim of ownership to this lot before it accepted it.

The only evidence tending to show that defendant had not accepted the wood were the declarations of Evarts, its superintendent, alleged to have been made after the time when this lot of wood had been deposited at "the Chinese wash-house," upon a demand therefor by plaintiff before the commencement of this action. There was no evidence of authority in the superintendent to make the declaration, except such as the title to his office implies.

Railway corporations enter so largely into the business transactions of the country, that courts should take judicial notice of the authority of their managing officers, upon the same principle that judicial notice is taken of the duties of officers of banks and other agents, whose authority is so generally understood as not to be the subject of inquiry. It is a matter of common knowledge that the superintendent of a railroad corporation is empowered to conduct its ordinary business transactions. The use of cord-wood is convenient, and, we may fairly say, indispensable, to the operations of railroads within this State. To receive such wood, and to declare whether it has been received, is, consequently, incident to the business of a railroad corporation, and the authority to determine matters of this nature must rest with some of its agents or officers. We assume that the officer charged with the conduct of defendant's ordinary business has the authority to determine so commonplace a matter as the receipt of cord-wood.

It is customary with railroad corporations to confer upon their officers and agents titles indicating and suggesting in general terms their authority to persons having business with the corporation. When an agent is clothed with a title implying general powers—as superintendent—the business public and courts may fairly presume he is what the corporation holds him out as being. Webster says a superintendent is "one who has the oversight and charge of something, with the power of directing." An agent having the

oversight and charge, with the power to direct, has a general and discretionary power within the scope of his agency. The law touching the liability of corporations arising from the acts of their agents has been greatly modified, as will be seen by reference to recent decisions.

In *Adams M. Co. v. Senter*, 26 Mich. 73, the court said: "The next question refers to the extent of Frue's authority, independent of specific and expressly granted powers. We are not satisfied that any testimony would be needed to show the extent of the ordinary powers of an agent in charge of such a mine. The authority of such officers must, within the usual range of business at least, be recognized judicially, like that of bank cashiers, vessel captains, and other known agents. The mining law recognizes agents by name, as known representatives upon whom process may be served. They are the persons who have the charge, personally, of the local business at the mines, and are necessarily to be treated as general agents, to do all that is fairly within the scope of corporate business in conducting the operations in that locality. The testimony of Mr. Palmer, which shows the usual range of such agencies, indicates no more than should be inferred. The business could not be conducted at all without a very wide discretionary power. There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual, in regard to the same business. A general agent needs no instructions within the range of his duties, and any limitations in his usual powers would not bind others dealing with him and not warned of the restrictions."

In *Grafins v. Land Co.*, 3 Phil. 447, the president of an incorporated company was intrusted with the management of an enterprise. His authority was limited by the directors, and did not authorize him to render the corporation liable for the services of the plaintiff. These facts were established in defence, but the court said: "When a body, incorporated avowedly for a special object, intrusts its president, or other principal officer, with the management of the business for which its powers have been conferred upon it by the courts or the legislature, it necessarily gives him the air and aspect, and clothes him with the functions, of a general agent, and should not afterwards he allowed to say that his powers are in fact special, and not general, to the injury of those who have trusted him in the faith and credit of the assets and resources of the corporation. In general, those who deal with an agent are bound to ascertain the scope and extent of his authority, and cannot go beyond it, for the purpose of charging the principal, even when they have been misled by their own credulity and the misrepresentations of the agent, that when a principal puts the agent forward as a general agent, or places him in a position where others are justified in the belief that his powers are general, the

restrictions which may be imposed privately on the agent will be immaterial, except as between him and the principal, and can have no effect on the rights or remedies of third persons."

A similar question arose in *Lee v. Pittsburg, C. & M. Co.*, 56 How. Pr. and was discussed by the court:

"What general or special powers were by the board expressly conferred upon Mr. Mullin as such president and manager, or what power inhered in those officers, we can only determine (in the absence of positive evidence) by inferences from such facts proved as throw light on this point, aided by the presumption that, as the chief executive officer and manager of the company, he must have been clothed with some powers and duties which, of necessity, pertained to these positions, as it was shown that the business for which the defendant was organized was the mining, shipping, and selling of coal; that it had mines in Pennsylvania, and large quantities for sale, which it sought to market in Buffalo and the neighboring province of Canada. We may fairly presume, further, that the defendant's president and manager had, by virtue of his offices, authority to make those contracts in defendant's behalf which it was necessary some agent should make for the prosecution of its business, and which the daily exigencies of that business might require. The hiring of operatives to carry on the work of mining coal, the making of contracts for the shipment of coal to the various markets, the employment of agents to receive and take care of coal at those markets, to attend to its sale and to collect and remit the proceeds, were necessary to the operations of the corporation; and it was also necessary that some agent should be clothed with authority to make such agreements. The public would have the right to assume that the president and manager of the company, claiming such authority, and exercising it, did lawfully possess it, and treat with him accordingly.

Upon similar presumptions all business men deal with the executive officers of banking, insurance, railroad, manufacturing, and other corporations, whose operations move the vast and complicated machinery of trade and commerce. Their boards of directors may, and no doubt often do, adopt rules and regulations defining the powers and duties of the various officers through whose agency the corporate powers and franchises are exercised. But such rules and regulations are to be found only in the minutes of the directors' proceedings, or other private records of the corporation. They are not published, nor do the public, with whom the officers of the corporation transact business, know or have the means of knowing what such rules and regulations are. And it often happens—so often as to be the rule rather than the exception—that the chief officers of a corporation exercise a very wide range of powers, virtually grasping the entire direction and control of all its operations, with the tacit consent and approval of the corporation, though it

has never, by any direct vote or recorded act, defined the nature or extent of their authority.

It is therefore very difficult, if not impossible, for those having dealings with corporate bodies to determine, except by circumstances and inference, what authority such officers have, or, in case of litigation, to prove their authority by positive evidence. Ought not the same evidence upon which prudent business men ordinarily infer the existence of the authority, to be satisfactory to courts and juries? And would not the enforcement of more stringent rules embarrass and hinder the operations of trade and commerce, and prove vexatious and injurious to the interests of the corporations themselves?

These considerations led the court to the conclusion that defendant's president and manager was the officer who, in the ordinary course of business, would be expected to possess authority to employ the plaintiff, and plaintiff had the right to presume that the officer was so authorized. *F. & M. Bank v. B. & D. Bank*, 28 N. Y. 425; *T. W. & W. R. R. Co. v. Rodrigues*, 47 Ill. 188; *McKiernan v. Leuzen*, 50 Cal. 61; *Southgate v. A. & P. R. R. Co.*, 61 Mo. 89; *In re the German M. Co.*, 19 Eng. L. & Eq. 591; *Walker v. G. W. R. R. Co.*, 2 L. R. 228; *Field v. N. Y. & A. S. M. Co.*, 59 N. Y. 644.

Further objection is made to the introduction in evidence of the admission of the superintendent, upon the ground that it was the statement of a past transaction, and formed no part of the *res gestæ*.

Plaintiff's theory is that the lot of wood of eighty-five cords was set apart for the defendant, but that defendant had not accepted it, and, therefore, the transaction was incomplete and continuing. In this view the declarations were made in the course of the transaction, and were admissible. Objection is also made that the evidence is insufficient to support the verdict. This objection is based upon the fact that plaintiff allowed Paquin to deal with the wood in such a manner as to lead defendant's agents to believe he owned it. This fact constitutes the estoppel pleaded by defendant.

One hundred and sixty cords of wood were in controversy. Plaintiff recovered judgment for the return of ninety-five cords of wood, or the value thereof. There was evidence tending to show that plaintiff was estopped from asserting ownership to the fifty-cord lot; that the corporation had notice of plaintiff's claim of ownership before it accepted the eighty-five-cord lot. The evidence upon these matters was conflicting. It was the province of the jury to determine these facts. With that determination we can not interfere. If defendant had notice of plaintiff's claim of ownership before its acceptance of the eighty-five cords of wood, plaintiff was entitled to recover them or their value. There was

no controversy as to the fact that ten cords of other wood, belonging to the plaintiff, had been taken by defendant.

There being testimony to sustain each of these matters, it is evident that the evidence is not insufficient to sustain the verdict.

The judgment and order of the district court are affirmed.

AMSTEIN

v.

GARDNER.

(184 *Massachusetts Reports*, 4.)

Under the Massachusetts Sts. of 1875, c. 77, 1876, c. 150, 1878, c. 191, 1879, c. 141, and 1880, c. 261, an action may be maintained against the manager of the Troy and Greenfield R. R. and the Hoosac Tunnel, for an injury to property caused by the defective construction of the railroad, under such circumstances that an action could have been maintained had the road been owned by a corporation and not by the Commonwealth, although the defective construction was the act of a former manager.

In an action for an injury to a horse caused by the defective construction of a railroad, the testimony of an expert that, in his opinion, a cattle-guard or barrier was necessary at a particular point, is incompetent.

If a horse escapes from the control of the owner's agent, through his negligence, and, after running six hundred and fifty feet, enters upon the tracks of a railroad corporation at a point where there are no barriers, and, after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover.

TORT against the manager of the Troy & Greenfield R. R. and the Hoosac Tunnel, for injuries occasioned to the plaintiff's horse by falling into the openings between the ties of a bridge in Buckland over which the railroad passed. After the former decision, reported 132 Mass. 28, the case was tried in the Superior Court, before Knowlton, J. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

H. Winn for the plaintiff.

C. Delano for the defendant.

C. ALLEN, J.—The principal question in this case is, whether an action can be maintained against the defendant, as manager of the Troy & Greenfield R. R. and the Hoosac Tunnel, to recover for an injury which occurred in consequence of defective construction, which was the work of his predecessor in office; or

in consequence of the omission of his predecessor to build a necessary cattle-guard or barrier to keep animals from entering upon the railroad and passing along the track or the lands on the sides thereof, the presiding judge having ruled that the defendant might be held responsible for damages caused by the defective construction of the railroad while he was manager, but not for damages caused by such construction which was the work of a former manager. It is contended by the defendant, that such liability only exists in any case for negligence or default of the manager in reference to things which he could control without going to the Governor and Council for means or authority, as, for example, the selection and employment of men, the management of switches, etc.; and especially that this action, if maintainable at all, can only be maintained against the former manager. But an examination of the statutes has satisfied us that neither of these grounds of defence is well founded.

The legislation material to be considered began in 1875. At this time the railroad and tunnel were nearly ready to be opened for business. By the St. of 1875, c. 77, § 1, a manager was to be appointed "to take charge of the Troy & Greenfield R. R. and the Hoosac Tunnel, and manage the same in behalf of the Commonwealth." He was to be removable at the pleasure of the Governor and Council; and, in case of a vacancy from any cause, the vacancy was to be filled by a new appointment. The manager was to be "held responsible in person and property, for all damages sustained by any person or persons recoverable by law in consequence of the mismanagement of said railroad or tunnel, to the same extent as a railroad corporation established by this Commonwealth would be liable," and to be entitled to receive, from the earnings of said railroad and tunnel, compensation for the damages recovered against him, and costs incident thereto. By § 2, he was to supervise the completion and arching of the tunnel, "and the renovation of the said Troy & Greenfield R. R." By § 3, the Governor and Council were to have "the said Troy & Greenfield R. R. renovated and relocated as far as they shall deem it advisable to adapt it for the transmission of passengers and freight." By § 5, reasonable tolls were to be prescribed by the Governor and Council, for the passage of cars with freight and passengers, etc.; and, in fixing such tolls, "due regard shall be had . . . to the development of business, as well as to the cost of said tunnel." The St. of 1876, c. 150, § 6, provided that the manager, under the direction of the Governor and Council and with their approval, "shall have and exercise the power and authority conferred upon railroad corporations by the general railroad act" of 1874, for the purposes expressed in said act and a preceding one, viz. in renovating and relocating the road. Under the St. of 1878, c. 191, § 1, whenever judgment is recovered in

an action for damages against the manager, under or by virtue of the provisions of the St. of 1875, c. 77, "no execution therefor shall be issued against the person or property of the said manager, but said judgment shall be paid out of the earnings of the road, in the hands of the treasurer" thereof; "and the manager shall be entitled to retain from the earnings of said road such sums as will be sufficient to pay and satisfy such judgment." By the St. of 1879, c. 141, § 1, it was provided that the treasurer of the railroad company should every month or oftener pay to the treasurer of the Commonwealth all moneys received on account of said railroad and tunnel, and should every month deliver to the auditor of the Commonwealth bills of all dues that might have become payable on account of said railroad and tunnel; and, when allowed, the amounts of such bills might be paid upon the warrants of the Governor and Council. By § 2, the manager was required to make a report to the Legislature annually of his doings, and of the earnings and expenses of said railroad and tunnel, with a detailed estimate of all sums to be required for the year next ensuing. The St. of 1880, c. 261, § 1, provided that the tolls fixed under the St. of 1875, c. 77, might be a proportionate part of the gross receipts of the railroad corporation using said railroad and tunnel; and § 3 authorized the manager, by direction of the Governor and Council, to make contracts with connecting railroads for the purpose of constituting through lines, and, in making such contracts, to agree to accept a pro rata of the through rates upon freight and passengers via such through lines.

Such was the state of the legislation at the time when the accident happened which is the subject of the present action; and the question to be determined is a question of the true construction of the statutes. It is urged, in behalf of the defendant, that the Commonwealth cannot be impleaded in its own courts, except by its own consent, clearly manifested by an act of the Legislature. But, without now considering how far this doctrine is applicable to its agents and servants, we are of the opinion that the Legislature intended to give its consent that the manager of its railroad might be sued in cases like the present. In undertaking the operation of the railroad, it is reasonable to think that the same responsibilities were intended to be assumed as ordinary railroad corporations are obliged to assume. The first section of the St. of 1875, c. 77, recognizes and declares this intention. The Legislature might well deem it a narrow policy for the State to undertake such management, without making adequate provision for meeting the ordinary responsibilities which are incident to this kind of business. Many of these are imposed by the common law on all common carriers of passengers and goods. Their expediency and wisdom have been recognized by the Legislature. The State, while holding all other and competing lines to a full measure of

common law and statutory responsibility, might well hesitate to say to the public, "We invite your patronage for this line, but do not intend to furnish the same remedies, in case of loss or injury, as other lines are subject to." Such a course might well be thought, on the one hand, to take an unfair advantage of other railroads, and, on the other hand, to injure its prospect of ultimate success, and hinder or defeat the development of its business. No sanction is to be found in the statutes for such a view. It is nowhere provided that the rates of carriage, for passengers or freight, shall be less, in consequence of the more limited responsibility or less perfect remedies which will exist in case of loss. On the contrary, there are special and numerous provisions looking to a different result. The road is to receive its full pro rata proportion of through rates. If it could be supposed that, on merely business grounds, it was found expedient to put this road on a different footing from ordinary railroads in respect to liability for losses or injuries, it is reasonable to think that full and plain words to express that intention would be found in the statutes.

It is urged upon our attention, that the manager has not the power to expend money on works of construction until appropriations are made for the purpose, and then only under direction of the Governor and Council. Conceding the point, what follows? Does it follow, if insufficient appropriations are made to keep the road in proper order, and to erect suitable cattle-guards and barriers, and if, by reason thereof, animals come upon the track, or persons are run over, or trains are thrown from the track, or losses or injuries of any kind occur, that there is no responsibility on the part of any one therefor? We think not. It is suggested that there may be an application to the Legislature for relief. But this is not a legal remedy. Such an application is not made under any provisions of law, and its reception and the action to be taken upon it do not depend upon any rules of law, but upon the judgment, wisdom or favor of the Legislature itself.

We are also of the opinion that it was the intention of the Legislature to give this remedy, in cases where it properly exists at all, by an action brought against the manager who fills that position at the time when the remedy is sought; and that it is not limited to the particular manager through whose negligence or default the cause of action arose. Otherwise, a manager would be liable to be sued long after his retirement from office, when his official relations with the Commonwealth have ceased, and when he has no longer any interest or duty in relation to the defence of the action. It is not to be supposed that the Legislature would deem it expedient to entrust the interests of the Commonwealth to the care of a retired official, who might by possibility have been removed for cause, or have entered the service of a competing line or of an employer having an adverse interest.

A like result is reached from a consideration of the relations of the Commonwealth, as an owner of a railroad, toward the public whose patronage it invites. The manager is in the nature of a sole or quasi sole corporation. Otherwise the remedy provided for any party aggrieved would be very imperfect. The original construction, or repairs and improvements, may be begun by one manager and finished by another. An investigation may be needed to determine whether work, clearly insufficient or defective, was done under one manager or another. There might also be a concurring negligence of two or more successive managers. Work or safeguards, originally sufficient, may become insufficient, either through natural decay or wear, or through the increase of business or population. The State cannot itself be sued, and did not intend to allow an action to be brought directly against itself. Nevertheless, it was to engage in the business of operating a railroad, through an officer called the manager, whose office was designed to be permanent. One manager might die, resign or be removed. The individual might change; but the office was to be permanent. To the public, the manager was put forward as the representative of the authority which owns the railroad. A liability was imposed on him by statute. In form, this was at the outset personal. In substance and effect, it was official. And, since the passage of the St. of 1878, the liability of his person and property is taken away. He is merely left as the person to be named as defendant in the suit, and charged with the duty of defending it; but with no personal responsibility for the payment of the judgment, and indeed, since the passage of the St. of 1879, with no power even to retain the earnings of the railroad for the purpose of satisfying it.

The next question is whether it was competent for the plaintiff to introduce the testimony of an expert to show his opinion that a cattle-guard or barrier was necessary at a particular point. Such testimony was incompetent. The question involved a consideration of the amount of travel on the highway, and other things, suitable to be judged of by the jury. *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U. S. 469; *Nowell v. Wright*, 3 Allen, 166; *Hill v. Portland & Rochester R. R.*, 55 Maine, 438.

The instruction of the judge, as to the statutory duty of maintaining a fence or barrier at the place where the plaintiff's horse entered upon the railroad, as modified, was in conformity to what the plaintiff now contends is the true construction of the statute; but the plaintiff insists that the jury were nevertheless misled by the instruction, as originally given as follows: "If the place where the horse entered on the railroad was a part of the yard and grounds used for shifting trains in connection with the Shelburne Falls station, or was within the highways or approaches entering upon or crossing said yard and grounds, the statute relating to fences

and barriers does not apply." Upon objection being made by the plaintiff, the judge modified the instruction by instructing the jury that, if they found the place such as described, there was no statute which absolutely requires the erection of a fence or barrier there, but it was for them to determine whether the erection thereof was necessary and practicable. Since a new trial must be granted on other grounds, it is unnecessary to consider this ground of exception.

The instruction that, "if the plaintiff's son was negligent in not keeping a firm hold on the halter, and this negligence was partly the cause of, and contributed to, the accident, the plaintiff cannot recover," was right, so far as it went. The plaintiff, however, urges upon us that the alleged negligence of his agent was too remote to be properly considered as contributing to the injury to his horse. But no instruction upon this aspect of the question appears to have been asked for. If, through the negligence of the plaintiff's agent, his horse got away, and ran, and was injured at the distance and place shown by the plan which was put in evidence, and if it was found by the jury that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might in their judgment fairly be considered to be a contributory cause of the injury, the plaintiff was not entitled to recover. It is not a case where, on the facts reported, the court can say, as matter of law, that the negligence was too remote. *McDonald v. Snelling*, 14 Allen, 290, 296; *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U. S. 474. Even on the doctrine of *Marble v. Worcester*, 4 Gray, 395, cited by the plaintiff, the negligence would not be too remote. In that case, a controlling consideration was, that the plaintiff was a stranger to all connection with the horse; and it was expressly said that the mere distance of place between the existence of the defect and the damage might not be sufficient to prevent a plaintiff from recovering.

Exceptions sustained.

Analogous Cases.—As bearing upon the subject of the liability of the manager in this case, we refer our readers to *Rogers v. Mobile & Ohio R. R. Co.*, and note, with cases cited, 12 Am. & Eng. R. R. Cas. 442.

As to the other question in the case, see *Savage v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. R. Cas. 566.

FALKINER

v.

GRAND JUNCTION RY. CO.

(4 Ontario Reports, Ch. Div., 850.)

Where the directors of a railway company passed a by-law enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1000 per annum, which by-law was afterwards, at a meeting of shareholders, repealed:

Held, that the by-law was within the competence of the directors, under O. S. C. ch. 66, sec. 47, and the shareholders could not undo the arrangement in respect of past services of the solicitor received by them.

Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for the manner of their payment.

The agreement to pay a solicitor a fixed sum as a yearly salary in lieu of paying items in detail is neither illegal nor unusual, whether it provides for the past or the future.

THIS was an action brought by Nathaniel Baldwin Falkiner against the Grand Junction Ry. Co., claiming a sum of \$5781.47 for his services as solicitor. In his statement of claim he alleged that by 44 Vic. ch. 64, O., it was enacted that a certain deed of amalgamation of the Grand Junction Ry. Co. and the Belleville & North Hastings Ry. Co. should be, and it was, declared legal and valid, and the two companies were amalgamated and united under the name of the Grand Junction Ry. Co. on the terms and subject to the provisions and conditions in the said deed contained; that previously to the said amalgamation he had been appointed and had acted as the solicitor of the Belleville & North Hastings Ry. Co.; that he was appointed such solicitor on August 12th, 1874, by the board of provisional directors, but without any fixed salary being named, and he served as such solicitor from the said date till November 12th, 1878; that on January 2d, 1878, a by-law was duly passed and enacted by the said Belleville & North Hastings Ry. Co. as follows:

“Whereas, at a meeting of the board of provisional directors of the Belleville & North Hastings Ry. held on August 12th, 1874, N. B. Falkiner was appointed solicitor of the said Belleville & North Hastings Ry. Co., and whereas he has acted as such ever since, and no salary or remuneration having been fixed, be it therefore, and it is hereby, enacted by the board of directors of the Belleville & North Hastings Ry. Co., that his salary as such be and is hereby fixed at the rate of \$1000 per annum from the date of appointment, in quarterly instalments.”

The plaintiff went on to allege that his services were worth

much more than \$1000 per annum, and that he was entitled to that sum at least as a proper remuneration for his services as such solicitor, and that he was entitled to be paid at that rate for the services he so rendered; that by virtue of the amalgamation of the two companies the Grand Junction Ry. Co. was the successor and entitled to stand in the place of the Belleville & North Hastings Ry. Co., and was subject to the liability and bound to fulfil the contracts entered into by the said Belleville & North Hastings Ry. Co.; and he claimed that the said Grand Junction Ry. Co., the defendants, were bound to pay the same; that before the amalgamation aforesaid he paid for the said Belleville & North Hastings Ry. Co. and at their request the sum of \$132.55, expenses of a certain Act of the Ontario Legislature in regard to the said company, that is to say, to the clerk of the said Legislature the sum of \$100, the sum of \$27 travelling and other expenses, and \$5.55 to the Ontario Gazette for printing, which sum of \$132.55 had not been repaid; and he claimed damages to the amount of \$5781.47 for his services aforesaid and said money paid and interest thereon from February 28th, 1882, costs of action and general relief.

By their statement of defence the defendants admitted that the plaintiff acted as solicitor for the Belleville & North Hastings Ry. Co. in certain matters, but submitted that he was only entitled to be paid at the usual rate, and subject to taxation by the proper officer for such services as he rendered to the company, and stated that he had not rendered any detailed bill with dates and items of his charges for such services, according to the statute in that behalf, one month before the commencement of this suit, and could not recover any part of his claim for the aforesaid reason.

They also alleged that no such by-law as alleged in the plaintiff's statement of claim was duly passed, and denied the power and authority of the board of directors of the said company to bind the company by any such by-law; that the said by-law was not duly passed in accordance with the statutes and by-laws affecting the said company, and was passed by fraud and collusion between the plaintiff and one Lloyd and others, then wrongfully assuming to be directors; that the said alleged by-law was afterwards at a meeting of the board of directors, and also at a meeting of the shareholders, repealed, annulled, and declared to be of no force or effect; and they also denied that the plaintiff paid at the request of the company the sum of \$132.55, as alleged by him.

The rest of the facts of the case sufficiently appear in the judgment.

The action was tried at Kingston, on May 28th, 1883, before Boyd, C.

A. R. Dougall, Q. C., and W. Cassels for the plaintiff.

Hector Cameron, Q. C., for the defendants.

BOYD, C.—There is no ground for impeaching the legality of the by-law on which the plaintiff relies, in respect of any irregularity or collusion as set up in the defence. The by-law was within the competence of the directors (C. S. C. ch. 66, sec. 47); it formally ratified the appointment of the plaintiff as solicitor of the company, and provided for his compensation at the rate of \$1000 per year, from August 12th, 1874. This by-law, passed on January 2d, 1875, was repealed at a meeting of the shareholders held on October 1st, 1878.

It was understood from the first that the plaintiff should be paid, not on the footing of detailed services to be set forth in a bill of items, but by way of a fixed sum to be determined at a subsequent period. The by-law represents the fulfilment of that understanding, and it was intended to provide for a fair remuneration (though lower than the ordinary allowance) for the services he rendered. There is no reason, considering all the evidence, for not awarding him compensation on the footing of this by-law, unless there is some legal obstacle. Two difficulties are urged by the defendants: first, that the by-law being repealed by the shareholders was as if it never had been; and second, that the directors had no power to fix for the future as well as for the past.

As to the first, I find no provision in the charter of this company giving the shareholders such a power as is claimed. Without express power it is the right of the directors to appoint necessary officers and agents of the company, and to provide for their manner of payment. It is not competent for the shareholders, having received the benefit of the services of the solicitor, to undo the arrangement by which he is to be paid and leave the matter all at large. By the action of the directors, the solicitor took no steps to preserve the details of what he did, and is not therefore in a position to render a bill of costs with detailed items. It was never contemplated that he should do this; and it would be unfair now to place him at the mercy of the successors of the company who have had the benefit of his services. The repeal of the by-law can, in my opinion, affect only the future and not the past, and it is the measure of the value of his services during its currency. *Bill v. Darenth Valley Ry. Co.*, 1 H. & N. 305.

The agreement to pay the solicitor a fixed sum as a yearly salary, in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future. *Jarvis v. Great Western Ry. Co.*, 8 C. P. 280; *Raymond v. Lakeman*, 34 Beav. 584; *Galloway v. Corporation of London*, L. R. 4 Eq. 70. Here the directors were not in the dark as to the nature or value of the services rendered and to be rendered; with a full knowledge of all that could guide them in properly appraising the value of what was furnished, they fix the amount, and I see no ground for disturbing what they have done.

No contention was made that the plaintiff was not entitled to recover for the \$100 paid to the clerk of the Ontario Legislature, and it should be allowed. Credit must be given for the \$500 paid to the plaintiff on account of his salary by Mr. Lloyd (which he says was afterwards borrowed from him by Mr. Lloyd) if this is insisted on; but in this event I think the plaintiff should have the account taken against the defendants, with interest from the date of the first payment, under the by-law. He is also entitled to his costs of suit.

See *Western Bank v. Gilstrap*, 45 Mo. 419.

RAMSAY

v.

MIDLAND RY. CO.

A station agent of a railway company is an officer examinable under Rev. Stat. Ontario, ch. 50, sec. 156, as to matters in question in an action brought against the company.

THIS was an appeal from an order of the Master in Chambers directing the station master of the defendants at Orillia to be examined as an officer of the corporation under section 156 of the C. L. P. Act, Rev. Stat. of Ontario, ch. 50.

Aylesworth supported the appeal.

Clement showed cause.

WILSON, C. J.—The superintendent of the defendants' railway says he has the supervision of station agents in his division. The duties of such agents are to sell tickets and receive payment for them, to receive freight for shipment, and to deliver freight arriving at the station for delivery, and to receive payment for it; to take charge of the servants about the station; such an Agent is also subordinate to and under the orders and subject to the instructions of the general superintendent, and also subordinate to and under the orders and instructions of the head of the traffic department. He has no original jurisdiction of his own, and he is not appointed by the board but by the deponent as superintendent of the line. His duties are those of a clerk or employee acting under the orders of the superintendent, and that Mr. Geddes, who is sought to be examined, holds the position of station agent and no other position on the line. In answer it is said the contract on which this action is brought was signed by the said Geddes, as the deponent, one of the plaintiff's solicitor, believes.

The statute provides that in the case of a body corporate "any

of the officers of such body corporate touching the matters in question in the action" may be examined, and "when the officer of a body corporate has been so examined * * such body corporate shall be deemed to be fully represented by such officer.

In *Dalziel v. Grand Trunk Ry. Co.*, 6 P. R. 307, the Master in Chambers said: "The tie inspector is not immediately responsible to the directors, and is not, I think, 'an officer' within the meaning of the Act." And on appeal, Harrison, C. J., supported the decision of the Master.

It is difficult to say precisely who is an officer and who is not an officer of a body corporate under the general words of the statute, "any of the officers of such body corporate," and who may, for the purposes of such examination "be deemed fully to represent such body corporate."

The expression "any of the officers" must mean, I think, others besides the highest governing body, such as the president and directors. They make all appointments to office, and are elected by the shareholders for that purpose.

The general manager of the body corporate must be an officer who is examinable, because he is appointed by the board to conduct the whole business of the company. The shareholders cannot, of course, attend to such matters, nor can the directors, and if they could attend to them they would not probably have the ability or qualification to manage them. They therefore have their general manager or some such person, by whatever name he may be called, who is their chief executive officer. He cannot, however, do everything himself. The business of the company must therefore necessarily be subdivided among others, such as the Chief Engineer, the Chief Superintendent of freight, and the like. Each department for the transaction of the business of the company becomes a distinct subdivision for the transaction of the particular business of that department.

What these subdivisions are I do not pretend to say, for I have no knowledge of or information on the subject. There may be a department specially devoted to passenger traffic, to baggage, to the purchase of supplies, to the internal police of the company, and perhaps for other purposes, and in such case I should say the head of that department, however he was appointed, was an officer of the company, and could represent the body corporate on and for the purpose of his examination.

Now the superintendent of freight, or the heads of the other departments, such as I have stated, if there are such departments, may not be able to manage personally the whole of the work committed to their supervision, and they may, of course with the knowledge and consent of the chief governing body, or of the general manager, subdivide their respective departments by having freight, passenger traffic, and the like, controlled at certain

convenient places along the line by representatives or agents, or by whatever other name they may be called, such persons acting in their respective subdivisions with the like powers as their superiors in the like larger departments under their control.

The chief subdivisions of the general business of the railway are, I should say from such general knowledge as people have of such matters, the stations along the line, and the person in charge of a station is the superior agent, manager or officer, or by whatever other name he is called, in his own department. He is, in fact, as he is usually called, "the station master." He is of course subject to the orders and instructions of his superiors; and although he may not, according to the routine in such cases, report to the general manager or to the directors, it is certain he would be bound to report to them if called upon by them to do so, and it is certain if he refused to do so, the directors or manager could dismiss him.

I do not know who selects or locates the stations—I should say it was not done by the directors—but when selected they are the stations of the company: nor do I know, nor do I think it of much consequence I should know, who appoints the station agent or station master: but I do know when he is appointed, whether by the directors, or by the general manager, or by the superintendent of the particular part of the line, he does become the agent and employee of the company and is the officer of the company in his own department, and as such he is examinable under the statute, and can and may represent the body corporate on and for the purposes of his examination.

The statute should, I think, receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it.

How far the word officer may be carried I do not now consider; but I have no hesitation in saying that an office or agency established by or for the company at these stations, and a person appointed by or for the company to manage and carry on its affairs, of the important and diversified nature of which they consist at these stations, and possessing and exercising the extensive powers with which he is and must be entrusted to enable him to discharge his duties towards the company, do constitute such a person an officer of the company within the meaning of the statute.

The station is like to the branch or bank agencies spread over the country, and I should be surprised to hear it argued that such local bank agent was not an officer of the bank.

In this case, too, it is said the station master actually executed the contract upon which the action is brought.

I affirm the decision of the Master in Chambers, and discharge the appeal, with costs.

TERRE HAUTE AND INDIANAPOLIS RY. Co.*v.***STRUBLE.***(Advance Case, United States Supreme Court. November 26, 1888.)*

A. agreed with the railway company defendant to construct and maintain stock-yards and feeding-pens, and to load, keep, and unload cattle in course of transportation over defendant's road at a fixed rate, and also to collect for the company all its freight and charges for cattle, and to pay over the same to it. In consideration of the premises the company agreed "to send all live-stock coming to East St. Louis over its road to A.'s yard, except such as may be specially ordered otherwise by shippers or owners, . . . and to give A. the loading of all live-stock which may be transported over its road from that city," for which services A. was to receive certain sums. Other stock-yards being subsequently constructed, the company defendant took from said yards certain cattle for transportation which had not been specially ordered there by their owners, and which could have been directed by the defendant to A.'s yards had they made any or proper effort to do so.

Held, that the company defendant had broken its contract and was responsible in damages.

Held, further, that evidence of the number of cars loaded by defendant and taken from the other yards was admissible as fixing the measure of damages.

The refusal of the court below to grant a new trial is not reviewable on error.

IN Error to the Circuit Court of the United States for the Eastern District of Missouri.

John G. Williams for plaintiff in error.

Jeff. Chandler for defendant in error.

HARLAN, J.—This action was brought by Struble, the defendant in error, to recover damages for an alleged breach of a written contract entered into between him and the Terre Haute & Indianapolis R. R. Co. A verdict and judgment were rendered in favor of plaintiff for the sum of \$10,440. The defendant moved for a new trial and in arrest of judgment, and both motions having been denied, the case has been brought here for review.

By the contract in question, Struble obligated himself to build and keep in good order, on his leased grounds in East St. Louis, Illinois, all necessary stock-yards and feeding-pens suitable for the reception, feeding, handling, loading, and unloading of live-stock which might be shipped or transported over the Terre Haute & Indianapolis R. R. to and from East St. Louis; to receive and unload all live-stock over that road; to collect all freight and

charges on same and pay over to the company or its authorized agents all moneys so collected; to order from the proper agent of the company all cars necessary for the transportation of live-stock from East St. Louis; to load in a proper manner all live-stock for transportation from that place by that company; to bed such cars at a cost to shippers of not more than one dollar per car, to be collected by him from shippers; and to attend to all other necessary matters pertaining to the safe and prompt loading of all such live-stock for transportation over that road.

The company, in consideration of the performance by Struble of the stipulations of the contract, agreed to build all necessary loading chutes for the use of the company connected with said yards; to send all live-stock coming to East St. Louis over its road to Struble's yards, except such as may be specially ordered otherwise by shippers or owners; to pay him 50 cents per load for all stock received by him over the road and unloaded in his yards, and two dollars for each and every car of live-stock loaded by him to be transported by the company from East St. Louis; and to give him the loading of all live-stock which may be transported over its road from that city. Struble's yards were completed and opened for business in December, 1870. From that date until some time in October, 1873, all live-stock coming to East St. Louis over defendant's line was unloaded at those yards, and live-stock shipped over that road from that city was loaded by Struble. Early, however, in the fall of 1873 the National Stock-yards were completed and opened for business. They were just outside of the corporate limits of East St. Louis, and near defendant's road. The plaintiff claimed that up to October, 1873, he performed all the conditions of the contract, and was ready, willing, and able to comply with it in all respects until it should, by its own terms, be terminated, but that he was prevented by defendant after that date from fully executing it. All this the defendant denied.

The record contains numerous assignments of error, but we shall notice only such as are relied on in argument. They seem to embrace every essential question in the case.

1. It is claimed that the court below erred in admitting evidence offered by the plaintiff. The specification under this head refers to evidence as to the number of cars loaded with live-stock and taken by the defendant from the National Stock-yards between August 1, 1874, and April 1, 1880. The contention of plaintiff was that, within the meaning of the contract, he was entitled to load those cars, and recover therefor from the defendant the price fixed in the contract for such services; this upon the alleged ground that that stock had not been specially ordered by shippers or owners to the National Stock-yards, and could have been directed by the defendant to Struble's yards had it made any or proper effort to do so. In this view the evidence objected to

was competent, as furnishing a basis to estimate the damages which plaintiff sustained by reason of the breach of the contract, if such breach was established by the evidence.

The court, among other things, said to the jury that in determining the quantity of stock that would probably have been shipped from the plaintiff's yards, they should include only such as the jury believed would have been possible for the defendant to direct to those yards. In the same connection the court said:

"The jury, in considering the meaning of the words 'all live-stock which may be transported over the said railroad from East St. Louis,' found in the last clause of the contract sued on, must determine from all the evidence before them what stock is included. The words evidently apply to such stock as in the ordinary course of the defendant's business should be shipped from that point over their line of railroad. It applies to all such stock whether loaded at plaintiff's yards or some other yards used for loading stock so shipped. As already suggested, it should be applied only to stock which it was possible for defendant to have loaded by plaintiff. It does not apply to stock, the owner or shipper of which directed the loading to be done by some person other than the plaintiff, and over the loading of which defendant had no control."

We are of opinion that there was no error in these instructions. The contract contemplated, upon the part of Struble, all the preparations necessary in and about his yards to meet the necessities of the company's business in the transportation of live-stock; and upon the part of the company that it would do all it could, in the absence of special orders from shippers, to bring live-stock to plaintiff's yards to be by him loaded in cars for transportation over defendant's road. Such was, in substance, the direction given to the jury. The court could not, under any reasonable interpretation of the contract, have said less than it did.

It is assigned for error that the court overruled defendant's motion for a new trial. A large part of the printed argument on behalf of defendant is devoted to a discussion of the grounds assigned in support of the motion for a new trial. But the action of the court below in refusing a new trial is not subject to review here. This has long been settled by the decisions of this court. *Railroad Co. v. Fraloff*, 100 U. S. 24; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 456; s. c., 11 Am. & Eng. R. R. Cas. 158.

The judgment must be affirmed. It is so ordered.

PHELPS & Co.

v.

GEORGE'S CREEK AND CUMBERLAND R. R. Co.

(60 *Maryland Reports*, 536.)

Where one of the parties to a contract is sued by the other party, for misrepresentations, by which the latter claims to have been deceived in making the contract, the declarations of an agent, made subsequent to the negotiations which culminated in the contract, are inadmissible.

The plaintiffs contracted with the defendant (a railroad company) to construct its railroad for a fixed sum. While the plaintiffs were waiting for the defendant to procure a part of the right of way, which they claimed was represented by the president of the defendant to be already secured, the price of rails took a sudden rise in the market, so that the plaintiffs were obliged to pay more for them, when they concluded to purchase, than they could have gotten them for had the work not been delayed. In an action for deceit brought by the plaintiffs against the defendant, it was *held* that the loss thus sustained by the plaintiffs was a damage too uncertain, remote and contingent to constitute a ground of recovery.

Representations offered in evidence by the plaintiffs, in regard to the capacity of the chief engineer of the defendant, and the correctness of his estimates, made by the president of the defendant, to other proposed contractors for the same work, and not communicated to the plaintiffs, or having any influence in inducing them to enter into their contract, were inadmissible.

The president and chief engineer of the defendant were competent to testify, on behalf of the defendant, the former that whatever representations he had made to the plaintiffs were made in good faith and from the best information he had, and the latter that he had made up the estimates in good faith and with no intention to defraud the plaintiffs; and it was for the jury, looking to all the evidence in the cause, to determine what credit was to be given to their testimony on this point.

A letter in reply to a previous letter from one of the plaintiffs, setting forth the nature of their complaint at that time, and put in evidence by them, was properly admitted in evidence on the offer of the defendant, to show the position of the defendant, communicated by it to the plaintiffs, as taken in regard to their complaints as then made; and was proper to be considered by the jury also in connection with the fact that for some twelve months thereafter the plaintiffs continued to prosecute the work under their contract, and the modifications from time to time made therein. Whether or not this letter was actually received by the plaintiffs was a fact for the jury to find, notwithstanding the plaintiffs denied that they had gotten a reply. It was competent for the jury to infer its receipt from the subsequent conduct and relations of the parties, as well as from the statement of the witness that it had been sent.

APPEAL from the Circuit Court for Washington County.

The case is stated in the opinion of the court.

A. Beall McKaig for the appellants.

Ferdinand Williams and William Walsh for the appellee.

RITCHIE, J.—This is an action of deceit brought by the plaintiffs to recover damages because of alleged false and fraudulent representations and estimates made by the chief engineer and president of defendant concerning the cost of constructing and equipping defendant's railroad, whereby the plaintiffs claim they were induced to contract with defendant to build and equip said road for a sum of money much less than the amount actually required, subjecting them in consequence to great loss.

The verdict and judgment being for defendant, the plaintiffs took this appeal.

During the trial below the plaintiffs took a number of exceptions, eleven in all, to the rulings upon the testimony and the prayers; the first, sixth and eighth of which, however, they abandoned in this court.

The second exception was taken to the rejection of plaintiffs' offer to prove by the witness John W. Phelps, one of the plaintiffs, that Patterson, the chief engineer of defendant, who had made the estimates of the cost of the road, had told him at his house, in the fifth month after the work had commenced under the contract, when witness was complaining to him that the quantities would largely overrun the original estimates, that "if he had shown to these gentlemen in New York that the road was going to cost \$700,000 or \$800,000, they never would have gone on with the building of the road." The offer covered by the tenth exception was substantially identical with this, and in our view the same rule of evidence is applicable to them both.

We think the declaration sought to be introduced in both offers, apart from the objection of indefiniteness in the expression "these gentlemen in New York," and the question of relevancy, was clearly inadmissible because not made by Patterson in the course of the negotiations which culminated in the contract. It was only during that period Patterson could be regarded as acting as the agent of the defendant company in relation to the contract. The declarations of an agent are admissible only because treated as the declarations of his principal, and the latter is bound by them only while the former is acting within the scope of the duties for which he was employed. When these duties are ended, his representative character of necessity ceases. What the agent said or did when acting for his principal is part of the *res gestæ*, and is to be proved afterwards as original evidence, and not by hearsay. 1 Greenleaf Evid. secs. 113, 114. "Declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract or the doing of an act in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding on his principal, and are not admissible in evidence." *Franklin Bank of Baltimore v. P., D. & M. Steam Navigation Co.*, 11 Gill & Johnson, 34.

The offer of proof giving rise to the third exception was to show that while the plaintiffs were waiting for the defendant to procure a part of the right of way, which they claim was represented by Loveridge, the president of the company, to have been already secured, the price of rails took a sudden rise in the market, so that plaintiffs were obliged to pay more for them, when they concluded to purchase, than they could have gotten them for had the work not been delayed. The contract, however, was not based upon the specific prices at which any of the articles to be furnished by plaintiffs could be bought; no stipulations or restrictions were embraced by it as to how or when they should be procured; and no responsibility as to what they might cost was assumed by the defendant. It was exclusively within the judgment and option of the plaintiffs when to purchase; the risks of a rising or falling market were entirely with them, and the defendant had no concern with the fluctuations in value. Had the price of rails fallen, instead of the reverse, while plaintiffs were holding off from buying, the gain would not have enured to the benefit of the company. In our opinion, the loss sustained by plaintiffs from the casual rise in the price of steel rails is, under the circumstances, a damage too uncertain, remote and contingent to constitute a ground of recovery in this action.

The fourth exception was to the ruling of the court in rejecting the testimony of the witnesses Dickinson and Smith, taken under a commission, in so far as it related to conversations had by them, respectively, with Loveridge, in which the latter made representations similar to those made by him to plaintiffs concerning the capacity of the chief engineer, Patterson, and the correctness of his estimates. These conversations were held with the witnesses with reference to the making of independent bids for the contract by each of them on their own account. Dickinson and Smith had no connection whatever with the plaintiffs, and it does not appear that what Loveridge stated to them was intended to be, or was, communicated to the plaintiffs, or had any influence in inducing them to enter into the contract they made with defendant. The plaintiffs could recover only upon representations made to or affecting them, and not upon representations addressed to others in no wise identified with them with the purpose of inducing them and not the plaintiffs to bid for the contract.

For these reasons we think the testimony was properly excluded.

The fifth and ninth exceptions may be properly considered together. They relate to allowing the engineer, Patterson, to state that he had made up the estimates in good faith and with no intention to defraud the plaintiffs, and to allowing Loveridge to state that whatever representations he had made to the plaintiffs were made in good faith and from the best information he had.

It is urged in support of these exceptions that these witnesses were incompetent to testify to the sincerity with which they did the acts and made the statements alleged to be fraudulent, upon the ground that the good faith of these acts and representations was the subject-matter in issue, and that it was for the jury alone to draw the inference from the nature of these acts and representations and the circumstances surrounding them, whether they originated in good faith or not, without a declaration of their bona fides from the parties whose motives were impugned.

The competency of parties, the bona fides of whose acts is the matter of inquiry, to testify as to the intent with which those acts were performed, is a point of some nicety, and the decisions are not uniform on the subject. It is manifest that where the law attaches to certain acts the conclusive presumption that they were done in bad faith, the party affected will not be permitted to contravene the legal imputation by his own assertions to the contrary. An illustration of this doctrine may be found in the case of *Ecker v. McAllister*, 45 Md. 309, which the appellants have cited. That case, however, was not similar to this. There the question was the legal effect of certain acts in contemplation of the bankrupt law, whose provisions attach the legal presumption of bad faith to preferences given to creditors when the debtor is insolvent. But the law affixes no presumption of fraud to representations such as were made by Patterson and Loveridge. So far as these representations in themselves are concerned, they were capable of being made either in good faith or bad faith. They might have been incorrect, and the plaintiffs might have been misled by them to their injury, and yet no right of action for deceit arise. Such a suit could be maintained only in case they had been made from a fraudulent design. Even, therefore, if not really true, the fact still to be ascertained was whether they were wilfully untrue. The ultimate and decisive fact therefore to be reached being the animus with which Patterson and Loveridge made their representations, we think they were competent to speak upon that subject. Their declarations, of course, would not be conclusive, but the fact to be ascertained being a disputable fact related to facts and circumstances on which the law has impressed no fixed inference, and that disputable fact being the actual intent with which Patterson and Loveridge had made their representations, we see no reason why they should not have been permitted to say what that actual intent was.

We think the weight of authority to be, that where the fact to be established is the intention with which an act has been done, to which act as matter of law no conclusive presumption attaches, as for instance the intention of a party in determining his place of residence, the party whose intention is the subject of inquiry may testify to the nature of his intention as he might to any other

material fact. As we have intimated, what credit is to be given the testimony of the witness on this point is for the jury to determine, looking to all the evidence in the cause. 1 Wharton on Evid. sec. 508, and authorities there cited.

The seventh and remaining exception upon the testimony was to the admission of a letter to the plaintiffs from Loveridge dated March 2, 1880. We think this letter was properly admitted because in reply to a letter of February 18th previous from one of the plaintiffs, put in evidence by them, setting forth the nature of their complaints at that time. It discloses the position of the company communicated by it to them, as taken in regard to their complaints as then made, and was proper to be considered by the jury also in connection with the fact that for some twelve months thereafter the plaintiffs continued to prosecute the work under their contract and the modifications from time to time made therein.

Whether or not this letter was actually received by plaintiffs was a fact for the jury to find, notwithstanding the plaintiffs denied that they had gotten a reply. It was competent for the jury to infer it from the subsequent conduct and relations of the parties, as well as from the statement of the witness that it had been sent.

In regard to the exception to the ruling of the Court upon the prayers, we think it sufficient to say, that in our opinion the instructions given to the jury by the Court itself fully and correctly set forth the law as applicable to the nature of the action and the evidence in the cause, and that the granted prayers of the defendant were not at variance with the instructions of the Court thus given. As these instructions of the Court amply and even liberally stated the grounds upon which the plaintiffs might recover, no legal injury resulted to the plaintiffs from the rejection of their prayers, which were properly refused for the reason among others that they did not confine the right to recover to the misrepresentations complained of in the declaration, and did not refer to or negative other facts in the case which might qualify the propositions stated in them.

The principles which govern an action such as the present, in which the right of recovery is based upon false representations, have been fully considered and announced by this Court in the cases of *McAleer v. Horsey*, 35 Md. 439; *Lamm v. Port Deposit Homestead Association of Cecil County*, 49 Md. 233; and *Buschman & Cook v. Codd*, 52 Md. 202; and in the light of these authorities, the plaintiffs certainly have no just cause to complain of the instructions given to the jury by the Court below.

Entertaining these views upon the present appeal, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

SHERWOOD & STARK

v.

SAGINAW, TUSCOLA AND HURON R. R. Co.

(Advance Case, Michigan. April 16, 1884.)

A railway contractor, after agreeing that the material furnished by him for construction should become the property of the company as soon as estimated by its engineer, sublet the job of fencing, subject to the conditions of his contract with the company. The contractor was paid eighty-five per cent on monthly estimates. The subcontractor furnished timber, but did not do his work within the time limited, and the company took possession of the timber. The contractor had before this surrendered his contract. The subcontractor sued the company in assumpsit and recovered. *Held*, by an equally divided court, that the judgment should be affirmed.

Cyrenius P. Black for appellant.

Tarsney & Weadock for appellee.

SHERWOOD J.—The plaintiffs bring trover to recover for a quantity of pine fencing lumber of the value of about \$600, and under the evidence and charge of the court were permitted to recover.

It appears from the record that Joseph B. Walton on the 28th of June, 1881, entered into a contract with defendant to construct a railroad track from East Saginaw to Sebewaing and furnish the lumber for and fence the same for the sum of \$2350 per mile. The contract contains fourteen clauses and six paragraphs of specifications describing the work, the material to be furnished, the manner of its construction, and terms of payment with much minuteness and at great length. It will, however, be necessary in disposing of the case to consider but four of its provisions.

The tenth paragraph reads as follows:

“Tenth. All materials furnished along the line of the road by said Walton, for use in construction, when estimated by the engineer, shall at once become the property of the said first party, and may be held to secure the performance of this contract on the part of said Walton; but to insure care on the part of said Walton, it is agreed that in case of destruction of any such timber or other material by fire, prior to the final completion of this contract, the loss shall be borne by him.”

Walton commenced work under his contract in the spring of 1881. On the second day of August, 1881, he sublet to the plaintiff the furnishing of materials for and building the fences for the

road. This was done by written contract with specifications similar to those in Walton's contract with the company.

The portions of this contract most needful to be considered are contained in paragraphs first, ninth and eleventh, as follows:

"First. That said party of the second part, for the price herein contained, shall at once enter upon the line of the above-named railroad included between the road, at station number three hundred and fifty-nine, the termination of said railroad at Sebewaing, and with suitable tools, men, teams, and materials, and all other things necessary to build, construct, and complete all the fencing included between said stations, and fully construct the same, and that all the said work embraced in this contract shall be fully completed to the satisfaction and acceptance of the engineer in the employ of the above-named railroad company in charge of said work, by the first day of December, A.D. 1881, agreeable and subject to all the conditions embraced in said Walton's contract with said railroad company."

"Ninth. That when the work embraced in this contract shall be fully done, and performed as aforesaid, and shall have been accepted by the engineer, the said party of the first part shall and will pay the said party of the second part for said work as follows:

"For all fencing built and completed, at the rate of thirty cents per lineal rod.

"For all necessary boards or fencing for said fence, at the rate of nine and one quarter dollars per thousand feet, B. M., and that the quantities shall be fixed and determined by said engineer."

There was written at the bottom of the eleventh paragraph the following: "The quantity of lumber required for said fence shall be computed at the rate of twenty-six feet, B. M., per rod of fence."

It is under these clauses that the defendant mainly claims to make defence. Neither the amount of lumber nor the fact that the defendant had the same are seriously contested.

The plaintiffs commenced work under their contract in November, 1881, and placed along the line of the road the lumber claimed for in the plaintiff's declaration before the sixteenth day of January, 1882, and on that day Walton surrendered his contract to the company which completed the road.

The lumber remained where it was hauled until after the seventh of March following, at which time the defendant knew Walton was in default and had not paid the plaintiffs for it. The defendant further ignored the plaintiffs in the matter, who therefore forbid its disturbing or using the timber, and on plaintiffs making demand therefor, refused to surrender it, and claimed to be the owner thereof under its contract with Walton.

The plaintiff never received any pay for the timber from

Walton, the company or any one else, and never delivered it to any one—a part of it when taken by defendant was not on its right of way as the plaintiffs claim.

We find no error in the rulings of the court upon the admissibility of the testimony.

The real question in the case therefore is, Under the contract with the plaintiffs did the title to the lumber placed along the line of the railroad pass to the company as soon as it was unloaded there, without other or further action on the part of the plaintiff?

The circuit judge held it did not, and I think correctly.

The contract between Walton and the plaintiff was partly printed and partly written, the printed portion containing several things not applicable to the work mentioned in the contract, and evidently do not refer thereto, and are not relied upon by either party.

The clause providing that the fencing was to be done and completed to the satisfaction of the defendant's engineer in charge of the work by the first day of December, 1881, "agreeable and subject to all the conditions embraced in said Walton's contract with said railroad company," applies to the manner in which the fence was to be built, and by whom to be inspected and accepted when built.

It was to be constructed of certain material, using a certain kind of posts, the work to be done in a certain manner; this was necessary in order to secure its acceptance by the defendant's engineer.

The ninth clause above quoted clearly shows the acceptance contemplated by the defendant's engineer was to be given after the fence was completed. It was not until then the money for material or construction became due.

Under the contract between Walton and the plaintiffs the lumber was not delivered by plaintiffs until it was placed into the fence and accepted by defendant's engineer.

Under the contract between Walton and defendant, the lumber was delivered by Walton as soon as he placed it on the ground along the line of the company's road, where the fence was to be built; but Walton could neither deliver the plaintiff's lumber to the defendant nor make a contract to deliver which would bind the plaintiffs or deprive them of the title to their lumber without the plaintiff's consent or agreement for that purpose, and such consent or agreement the defendant never had.

It does not appear from the record that the plaintiffs ever saw Walton's contract with the railroad company or knew any of its provisions except so far as they were referred to in their contract with Walton.

I think the Circuit Judge took the correct view of the case, and

there is no error either in his rulings or the charge, and the judgment must be affirmed.

COOLEY, C. J., concurred.

CHAMPLIN, J.—On the 28th day of June, 1881, the defendant entered into a written agreement with Joseph B. Walton for the construction of its railroad between certain points ascertained, and to fence the road according to certain specifications. Estimates were to be made monthly of the work done and materials furnished, and Walton was to be paid eighty-five per cent of the estimates according to the contract price. By the tenth clause all materials furnished along the line of the road by Walton for use in construction when estimated by the engineer at once became the property of the company, and might be held by the company to secure Walton's performance of the contract.

On the second day of August, 1881, Walton entered into a written agreement with the plaintiffs by which the plaintiffs agreed to construct and complete all fencing between certain points named in the contract to the satisfaction of the engineer employed by the defendant, and furnish the materials therefor except the wire, nails and fastenings, and to have the same fully completed "by the first day of December, 1881, agreeable and subject to all the conditions embraced in the said Walton's contract with the railroad company." When the work was fully completed plaintiffs were to receive payment for it as follows: For all fencing built and completed, thirty cents per lineal rod; for all necessary boards or fencing for said fence at the rate of nine and a quarter dollars per thousand feet board measure, and the quantities were to be fixed and determined by the engineer, and estimates of the labor and material furnished were to be made about the first of each month, and ninety per cent was to be paid plaintiffs on or about the 15th of each month.

Where, as in this case, a contract is entered into referring in express terms to another contract and subject to all the conditions embraced therein, both parties must be held to be fully cognizant of all the stipulations embraced in the contract referred to and be controlled thereby. One of the stipulations of the contract between defendant and Walton was that all materials furnished along the line of the road to be used in the performance of his contract were to become the property of the defendants as soon as the same were estimated by its engineer. The record shows that the lumber in question was placed on the line of the defendant's road to be used in fulfilling the contract between the defendant and Walton, and had been estimated by its engineer, and Walton fully paid therefor by defendant, and under the terms of both contracts the title must be held to have passed to the defendants. It appears, moreover, from the course of dealing between the parties,

that the plaintiffs must have been aware that the defendants were estimating this fencing in controversy and paying Walton eighty-five per cent on his monthly estimates. Indeed it seems to be a necessary inference from the terms of the two contracts as to payments. Walton's estimates were to be made between the 1st and 10th of each month, and payment made to him on the 12th, while the payments were to be made by Walton to plaintiffs on or about the 15th of each month. This enabled Walton to receive his pay on the estimates made by the engineer and pay to plaintiffs immediately thereafter. If, therefore, plaintiffs were aware of the fact that defendants were estimating this fencing at the points on the road where they caused it to be delivered, as lumber delivered by Walton under his contract, and upon which by the contract they were paying him eighty-five per cent of such estimates, as the records tend to show they did, they are estopped from saying that the title to the fencing did not pass from them to Walton or to the defendants. I think the judge erred in his construction of these contracts, and that the judgment should be reversed.

CAMPBELL, J.—I concur with my brother Champlin.

NEW ENGLAND IRON CO.

v.

GILBERT (METROPOLITAN) ELEVATED R. R. CO.

(90 *New York Reports*, 153.)

Two contracts, purporting to have been made by the parties, recited that said parties had caused their corporate seals to be fixed and their corporate names thereto "subscribed respectively by their proper officers." To each contract was in fact attached the corporate seal and the proper signature of each party; the plaintiff's by a director, the defendant's by its president. In an action upon the contracts evidence was given tending to show that defendant's seal was affixed by its president in the exercise of lawful authority. *Held*, that the evidence was sufficient *prima facie* to establish that the contract was so executed as to bind both parties.

By the provisions of one of the contracts plaintiff, in consideration of the covenants therein set forth on the part of the defendant, agreed to furnish the materials and to erect on masonry to be furnished by defendant, an elevated iron railway, in New York City, conforming in all particulars to plans and specifications approved by engineers named, a copy of which specifications it was declared was annexed to the contract. Plaintiff agreed to commence erecting the railroad at such point on the route as might be named by defendant's president, and to commence work preparatory to such erection as soon as that officer should notify it that defendant's capital stock was subscribed, and thirty per cent thereof paid into the treasury. Defendant agreed to designate the order in which the work should be commenced and completed, and to pay therefor a specified price per mile in monthly payments for the work done the preceding month. Plaintiff was not

required to prosecute the work any faster than money to pay therefor should be furnished by defendant. Defendant subsequently, without giving plaintiff the prescribed notice, entered into a contract with another corporation for the construction of the work. *Held*, that although defendant did not, in express terms, undertake to do the act or give the notice required to set the plaintiff in motion, a promise to do so, or at least a promise that plaintiff should have the building of the railway in case that enterprise was prosecuted by defendant, was implied.

No copy of the plans or specifications was annexed to the contract. Papers of that character, however, were produced in evidence bearing the signatures of the engineers named, which plaintiff's evidence tended to show were the ones referred to. *Held*, that the annexation of the copy of the specifications was not a condition on which the validity of the contract depended; that the originals, so far as referred to in the contract, became constructively a part of it; and therefore that the failure to annex the copy was immaterial.

Provision was made in the contract for subletting all or any part of the work, but it was declared that such subletting should not release plaintiff from its obligations, and that the sub-contractors should be regarded as plaintiff's agents. After the same was executed, and before defendant entered into the new contract, plaintiff became insolvent and assigned all of its property to trustees for the benefit of creditors, the trustees having power to make such arrangement and disposition of the company's contracts as they should deem judicious. The assignment, after providing for payment of all of plaintiff's debts, directed the trustees to pay over any surplus to its treasurer. Plaintiff had expended, before the assignment, several thousand dollars in necessary preparation for executing it. The trustees held the shops and machinery transferred, in order that plaintiff might resort to them to execute the contract, and plaintiff's ability so to do, notwithstanding its embarrassment, was established. The trustees settled all claims against the plaintiff and reassigned the contracts to it before defendant entered into the new contract, and the latter was frequently notified of plaintiff's readiness and willingness to perform. *Held*, that the insolvency and assignment did not justify defendant in treating the contract as abrogated, or give cause for rescinding it, and did not discharge that company from its obligations; that the contract was assignable, but conceding it was not, then it was not embraced in the trust deed.

A contract can be rescinded only by the acts or assent of both parties.

Plaintiff is a Massachusetts corporation. After the execution of the assignment it filed certificates in the office of the secretary of that State, under oath of its officers, to the effect that it had ceased operations, assigned its entire property, and had "only a nominal organization for the purpose of liquidation, being wholly insolvent." The court decided these certificates to be conclusive against plaintiff. *Held* error; that, while they were proper evidence, they were not conclusive in such an action as this; that as the corporation was not in fact dissolved or relieved from the obligations of the contracts, it was a question of fact upon the whole evidence whether it was able and willing to perform.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 9, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing the plaintiff's complaint on trial.

This action was brought to recover damages for an alleged breach of contract.

The material facts are set forth in the opinion.

A. J. Vanderpoel and F. J. Fithian for appellant.

Francis C. Barlow for respondent.

DANFORTH, J.—Notwithstanding the arguments addressed to us, both orally and in writing, by counsel for the defendant, we find it impossible to say there was not a question for the jury, which, if answered by them in favor of the plaintiff, would have required an assessment of damages for the breach of contract set forth in the complaint. Moreover, since the oral judgment, the discussion has been so continued by the contending parties through printed briefs, that we are at once brought to a consideration of that question as presenting the vital point in the case.

The facts are simple. Upon the trial the plaintiff put in evidence two contracts bearing date, the one March 24, the other March 27, 1873, purporting to have been made between it and the defendant, each reciting that the parties had caused their corporate seals to be affixed and their corporate names thereto "subscribed respectively by their respective proper officers" on the day of its date; and to each there is in fact the true corporate seal of each party and the proper signature of the corporation by one of its officers, the plaintiff's by Mr. Wiggin, a director, the defendant's by Mr. Foster, its president. By its provisions the plaintiff, in consideration of certain covenants and promises by the defendant, in the contract set out, undertook to furnish all the materials for, and erect on masonry to be furnished by the defendant, an elevated iron railway in the city of New York, conforming in all particulars to the plans and specifications approved by Edward H. Tracy and Henry A. St. John, a copy of which specifications is declared to be annexed and to form a part of the contract "so far as the said specifications refer to the work above said masonry." The beginning and end of the road is indicated, but it is provided that changes may be made as the defendant shall thereafter designate in writing. The plaintiff agreed to commence erecting the railway at such point on the route as might be named by the defendant's president, and to commence work preparatory to such erection as soon as he should notify the plaintiff "that the capital stock of said railway company is subscribed and thirty per cent thereof paid into the" defendant's "treasury, and, provided such notice shall be given on or before the first of April" then "next," to prosecute the work and the erecting the railway, and have the same completed from Chambers street to Forty-second street by the first day of January, 1874. Provision is made for subletting the construction of any or all parts of the railway, "it being understood, however, that such subletting shall not release the" plaintiff from any of the obligations or undertakings in the contract expressed, and that such sub-contractor or contractors are to be

regarded as the agents of the plaintiff. The time for the completion of the railway is fixed, provided the defendant seasonably furnishes the masonry. In consideration of these things the defendant agrees to designate the order in which erection of the railway shall be commenced and completed, and pay the sum of \$735,000 per mile, and in certain cases \$23,000 per mile additional—as for extra material and labor—in monthly payments of ninety-five per cent of the contract price of all work done and material furnished and put in place during the month preceding; but it is also provided that the plaintiff shall not be required to prosecute the construction of the road any faster than money to pay therefor shall be furnished by defendant. No copy of specifications was annexed to the contract.

It was held in the court below that the contract was complete both in form and substance, and so executed as to bind both parties; but the trial judge dismissed the complaint because upon the evidence he was of opinion that the plaintiff was itself in fault, and the General Term by a divided court have affirmed his decision. The dissenting judge was for a new trial for error in that conclusion.

We have been led by the argument of the respondent to examine both propositions, but as to the first think it sufficient to say, that we agree with the court below in the opinion that the contract is mutual in all things, and valid and binding on the parties. Its object was within the powers conferred by law upon the defendant (Laws of 1872, chap. 885, p. 2179, vol. 2), and its intention to effect it, was manifested by its common seal. In one view of the facts the seal was affixed in the exercise of lawful authority, and was sufficient to sustain the plaintiff's case, until impeached. Whether the defendant's evidence was enough for that purpose, was at least a question. *Burrill v. President, etc., of the Nahant Bank*, 2 Metc. 163; *Lovett v. Steam Sawmill Ass'n*, 6 Paige, 54; *Whitney v. Union Trust Co. of N. Y.*, 65 N. Y. 576.

Nor do we think it material that the copy, plans and specifications referred to in the contract were not in fact annexed to it. Papers of that character were introduced in evidence, executed in duplicate, and bearing the signatures of the persons named. As the evidence stood, the jury might have found they were the ones referred to, and if so, it was sufficient. The work is to conform to "the plans and specifications"—meaning of course the original plans and specifications. It is true the parties say "a copy of which said specifications is hereto" (that is to the contract) "annexed," but the qualification, "so far as the said specifications refer to the work" indicated, relates to the originals, and in case of difference, they would furnish the criterion by which to determine whether the railway when completed did conform to the agreement. The copy, whether annexed or not, would not govern. Its

annexation would furnish a ready mode of determining that question, but the binding quality would be in the original. It was its office to describe the plan, and the copy could not diminish the stipulations, which a reference to it incorporated into the chief agreement. The annexation of the copy specifications was not a condition on which the validity of the agreement depended. If annexed the identification might be more satisfactory, but without that, the contents of the plans and specifications, so far as referred to in the agreement executed, became constructively a part of it, and in that respect made one instrument. *Cook v. Allen*, 67 N.Y. 578; *Tonnele v. Hall*, 4 id. 140. Although the defendant does not in express terms undertake to do the act, or give the notice which shall set the plaintiff in motion, a promise to do so, or at least a promise that the plaintiff shall have the building of the railway if that enterprise is prosecuted by the defendant, is clearly to be implied from the covenants and stipulations which were inserted and to some of which I have above referred, to make the contract binding on the plaintiff. There is manifested a clear intention on the part of the defendant to construct the railway, and for that purpose do certain things, among others, raise the money, provide the masonry and give instructions to the plaintiff. These things and others on the part of the defendant, the plaintiff by the contract acquired an interest in having performed, and there is an obligation for their performance to be implied in its favor. *Booth v. Cleveland Rolling Co.*, 74 N. Y. 15; *Jones v. Kent*, 80 id. 585; *Roberts v. Marston*, 20 Me. 275; *Add. on Cont.* § 1400.

Upon the question as to which the learned judge differed in opinion from his associates, we think he was in the right. Of course if, as the respondent contends, the contract was broken and abandoned by the plaintiff, no recovery could be had upon it. But what was the condition of the parties at the time of the breach complained of? In October, 1873, the plaintiff conveyed all its real estate and personal property to Daniel C. Holden, William M. Whitney and Edwin R. Wiggin in trust for the benefit of its creditors with power, among other things, in their discretion, to make such arrangement and disposition of any and all contracts of said company as they should deem judicious. On the 24th of November, 1875, these trustees in due form reassigned the contracts of March, 1873, to the plaintiff, with intent, as they declared, to revest the full title in it, and the rights secured thereby, as fully and entirely as if the assignment of October 9, 1873, had not been made.

It is obvious that the first act looking to the performance of the contract was to be taken by the defendant, for it was only after notice of funds in the treasury that the plaintiff was to go on; but this need not be argued, for it was conceded by the learned

counsel for the respondent before us that the first act under the contract (treating both papers as being one contract) was to be done by the defendant, and that this act was not done. Nor is the commission of the act of which the plaintiff complains denied. It stands conceded that in February, 1876, negotiations were entered into between the defendant and a corporate body known as "The New York Loan and Improvement Co.," for the construction in substance of the very work covered by the contract which I have described, and these negotiations, on the 6th of March, 1876, resulted in a contract for that purpose, binding on both parties.- This is the breach on which the plaintiff relies, and it is admitted by the defendant, but its learned counsel contends that the assignment by the plaintiff and the conduct of it, and its trustees, let loose the defendant and justified it in treating the contract as abrogated and rescinded. This was also the ruling below, and such was the course of the trial that the material question is whether the assignment by the plaintiff, to which I have above referred, and the acts and declarations of its officers after it, were such acts of disqualification to perform, as in and of themselves discharged the defendant from the obligation of the contract of March, 1873. I put it in this form, because up to the time of the alleged breach, I discover no evidence of any intention on the part of the plaintiff to make an end of the contract, nor any notice to the defendant of a disposition to do so, nor the omission of any act to the performance of which it was bound. It should also be borne in mind that the plaintiff has not at any time ceased to be a corporation. It has remained capable of acquiring and holding property (*Bradt v. Benedict*, 17 N. Y. 93), and there has been no period of time during the transactions disclosed in the record, when it was not liable to be sued (*Kincaid v. Dwinelle*, 59 N. Y. 548; *Revere v. Boston Copper Co.*, 15 Pick. 351), nor when it might not also sue (*Boston Glass Manufactory v. Langdon*, 24 Pick. 49).

The defendant contends that the contract was not assignable. If that should be conceded it would follow that it was not embraced in the trust deed, and the question before us would be easily answered. But as to that the court below held otherwise. The matter of the contract involved no personal relation or confidence between the parties, or exercise of personal skill or science, for the contractor was a corporation and its work was necessarily to be done through agents or servants. There are no words restraining its assignment, and the mere fact that the persons representing the contractor are assignees, and not merely agents or servants, will not operate as a rescission of, or constitute a cause for terminating, the contract. *Devlin v. The Mayor*, 63 N. Y. 8. It could be rescinded by the acts or assent only of both parties, and here there is no evidence that the plaintiff, at any time, intended

to abandon or dissolve it. On the contrary there is evidence of an expenditure on its part of several thousands of dollars in necessary preparation for executing the contract, before assignment, and no evidence of a refusal, at any time, fully to perform it. In fact the time had not come for the plaintiff to do more than it had done.

Did it evince an intention to be no longer bound by the contract? It is not contended that it did. The respondent relies upon its assignment and insolvency as showing an inability to perform, and upon that, not as evidence for the jury, but as calling for a legal conclusion that thereby the defendant was set free. But the plaintiff was not relieved from the obligation of the contract. Suppose the defendant had, after the assignment, taken the first step, and called upon the plaintiff to perform. There was nothing in the nature of things to prevent the plaintiff, or its trustees, from complying. Suppose it had failed to comply. Then there would have been nothing to prevent a claim for damages on the part of the defendant for its non-compliance. If established, the claim would have been good against the assets, if any there were in the hands of the trustees, not otherwise appropriated, or any property acquired by the corporation. But as the case stood there was no repudiation of the contract, no refusal to perform, no evidence even of inability. The discussion of this proposition is very much limited by the frank and explicit statement of the learned counsel for the defendant, that he does not claim that mere bankruptcy is a rescission by the plaintiff. Much less does that follow a voluntary assignment. Bankruptcy applies the effects of the debtor to the discharge of his obligations, and then releases him from the weight of them. The assignment in this case had no such consequence. It did not change the relation between the contracting parties. The plaintiff still remained the contractor and responsible to the defendant for the performance of his contract with them. *Mandeville v. Reed*, 13 Abb. Pr. 173.

We think it unnecessary to repeat here the English cases cited by the respondent as to the effect of insolvency or bankruptcy upon contracts made by the insolvent. They have been examined, but the case before us, as it now stands, is not within them. There was in fact no rescission by the plaintiff, nor evidence that the conduct of the defendant was induced either by a belief that there was a rescission, or a belief that the plaintiff intended to abandon the contract, or that the defendant in such belief had likewise abandoned it. Indeed at the time of the breach by the defendant, there had been no notice to the defendant, actual or constructive, of the circumstances now relied upon as a defence. It is claimed that notice should have been given by the plaintiff or the plaintiff's assignees of an intention to stand by the contract. But such notice could not be necessary until, by the omission of

some necessary act on their part, the defendant had been justified in coming to the conclusion that the other party intended to abandon it. Such circumstances raised the question of mutual rescission in *Ex parte Chalmers*, L. R. 8 Ch. App. Cas. 289, and in *Morgan v. Bain*, L. R., 10 Com. Pleas, 15. What acts or proceedings then of the plaintiff or its assignees do work that result? "The insolvency and the assignment of the plaintiff?" "These things," the learned counsel says, "relieved the defendant from all obligations under the contract." His reasons are: first, the contract is not assignable; second, an implied condition that the contracting party shall not change its status or condition. The first I have already considered, and we discover nothing from which such a condition can be implied. Varying fortunes in an individual or a corporation are within the common experience of all, but it has not been thought that the obligation of a contract was affected by that circumstance.

If dissolution had taken place, a very different question would come up. Dissolution was not even thought of. The assignment itself, after providing for the payment of all the debts of the plaintiff, directs the trustees to pay over to its treasurer such surplus as might remain, and there is evidence tending at least to show that its assets were considerable, that every claim was settled and its means of raising money ample for any purpose required by the contract. It was, however, held by the trial court that a *prima facie* case as to the plaintiff's ability to carry out the contract, notwithstanding its embarrassment, had been made out, and the plaintiff's counsel did in fact, upon this intimation, forbear further evidence. The ruling upon that point, therefore, must be regarded at this stage of the case as final.

There is evidence also that the trustees held the shops and the machinery—the works, until 1878, in order that the plaintiff might resort to them to execute the contract at any time it had orders to do so. There is evidence of repeated communications to the defendant—one in the fall of 1873, immediately after its failure and just before or just after the assignment, and some as late as the spring of 1876—of a desire and readiness on the part of the plaintiff to execute the work, and that the shops were retained for carrying out the contract. But all this the trial court held insufficient, by reason of certificates made by the plaintiff in 1874 and 1875, and filed in the office of the secretary of the State of Massachusetts, to the effect that it ceased operations in September, 1873, and on October 8, 1873, transferred its entire property, real and personal, to trustees for the benefit of its creditors, and now has only a nominal organization for the purpose of liquidation, being wholly insolvent." The certificates were under the oath of the officers of the corporation, and the learned judge held them conclusive against the plaintiff. In this there was error. The certifi-

cates were evidence, but excluded no other evidence. It is unnecessary to inquire how far the statements would conclude the corporation in any proceeding by the State—the State is not concerned—nor how far the affiant, if a witness, might be affected if he gave a different version of the matters referred to. His credibility would be for the jury. But no statute has been cited which gives to the papers the force claimed for them as evidence, nor have we any precedent which requires a court to hold them conclusive in a civil action by the corporation to assert its right of property.

If the corporation was not in fact dissolved—as it clearly was not—if it was not relieved from the obligations of the contract—and this we hold—then upon the whole evidence which might be produced by the parties, it was for the jury to say whether the plaintiff was able and ready and willing to execute the contract, and if it was, then, whether by the defendant's violation of it, the plaintiff sustained damages. As to the evidence already in, we forbear comment. As the case now stands it was not properly disposed of at the Circuit.

The judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Contract with Corporate Seal Annexed.—In general, where an instrument is sealed with the seal of the corporation which purports to have been affixed by the proper officers it is *prima facie* a valid corporate act. *Tenney v. Lumber Co.*, 43 N. H. 343; *Hutchins v. Byrnes*, 9 Gray, 367; *Havens v. Adams*, 4 Allen, 80; *Sherman v. Fitch*, 98 Mass. 59; *Eureka Co. v. Bailey Co.*, 11 Wall. 488; *Reed v. Bradley*, 17 Ill. 321; *Leggett v. N. J. Mfg. Co.*, 1 N. J. Eq. 541; *Koehler v. Black River, etc., R. Co.*, 2 Black, 715; *Conine v. Junction, etc., R. Co.*, 8 Houst. (Del.) 288; *Bank of Middleburg v. Rutland, etc., R. R. Co.*, 30 Vt. 159; *Woodman v. York, etc., R. R. Co.*, 50 Me. 549.

HUTCHINSON et al.

v.

NEW SHARON, C. V. AND E. R. Co.

(*Advance Case, Iowa. April 10, 1884.*)

Where a party fails to entirely complete work, under a written contract with a railroad company to grade a line, because the company abandons the construction of that portion of the line which remains to be graded, and directs the contractor to cease work, the corporation cannot recover damages for failure to perform the contract, although the work was not completed within the stipulated time, there being no complaint made on this ground.

A written contract *held* to be properly construed.

Where the preponderance of evidence, without considering a written contract, is with the party contesting the reformation of the contract, it will not be reformed.

APPEAL from Mahaska Circuit Court.

This is an action in equity by which it is sought to foreclose a mechanic's lien upon the railroad of the defendants for money claimed to be due upon a contract for grading part of said road. There was a decree for the plaintiffs, and the defendants appeal.

R. A. Sankey, S. C. Cook, and Lafferty & Needham for appellants.

J F. Lacey for appellees.

ROTHROCK, C. J.—In June, 1881, the plaintiffs entered into a written contract with defendants by which plaintiffs undertook to grade ten miles of railroad. That part of the contract which provides for the compensation to be paid for the work is as follows: "Twelve cents per cubic yard for all earth moved from cuts or fills four feet in height or depth, and hauls not to exceed five hundred feet in length; and for all earth moved from cuts or on to fills over four feet in height or depth, and under seven feet, the second parties are to receive 16 cents per cubic yard; and for all earth moved on to fills thirteen feet in height the same rate of seventeen cents per cubic yard; and for all cuts over seven feet in depth the second parties are to receive a like increase of proportion of the price above sixteen cents per cubic yard."

The plaintiffs did not entirely complete the work, and for this reason the defendants claim damages. We do not think that the evidence shows that the defendants are entitled to any damages on this account. It appears that the railroad company abandoned the construction of that part of the line which plaintiffs contracted to grade, and directed the plaintiffs to cease the work under the contract. It is true, this was after the time fixed in the contract for the completion of the work thereunder, but it does not appear that any complaint was made by the company of any failure to do the work within the stipulated time.

The defendants further pleaded that the real contract between the parties was "that the sixteen cents per cubic yard provided for in said contract was to be paid for the excess over four feet and under seven feet in cuts or fills, and not for the whole amount of the cut or fill when over four and under seven feet, and that the seventeen (17) cents per cubic yard, provided for in said contract should be for the excess over seven feet and under thirteen (13) feet in height on fills;" and that the "like increase" provided for in said contract for all cuts over seven feet in depth should be for the excess over seven feet, and not for the whole cut, and by reason of oversight and mistake in drafting the contract the pro-

vision in regard to the excess in said several particulars was omitted. It was asked that the contract be reformed accordingly. Evidence was introduced on this branch of the case by both parties. The court found that there was no sufficient proof made to authorize a reformation of the contract. This finding was clearly correct. Indeed, it appears to us that upon this issue the preponderance of the evidence, without considering the written contract, was with the plaintiffs.

The court construed the contract as meaning that wherever a cut or fill in any part of its length exceeded four feet, the whole of that part should be estimated at sixteen or seventeen cents per yard from the natural surface up or down, and that that part of the same cut or fill which was less than four feet should be estimated at twelve cents per yard. We believe this construction was correct according to the contract as written, and there being no showing that the plaintiffs understood it in any different sense, that construction was properly adopted. Affirmed.

HELTZELL

v.

CHICAGO AND ALTON R. R. Co.

(77 *Missouri Reports*, 315.)

In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer, whose official relation to the governing body, or managing agent, or chief officer, would make it his duty to communicate the notice, will be sufficient. The secretary is such an officer.

Where materials are furnished for the construction of a railroad in car-load lots, under separate and independent orders, no lien therefor can be acquired under article 4, chapter 47 of the Revised Statutes of 1879, for such car-loads as were furnished more than ninety days before the filing of the account claimed to be a lien, although others were furnished within that time.

Materials furnished to a contractor for, and used by him in the construction of, a railroad, are to be regarded as furnished to the railroad.

APPEAL from Audrian Circuit Court.

Macfarlane & Trimble for appellants.

If all the materials are furnished under one contract, or one request, one indivisible lien will be created, but when under several contracts or requests, each separate contract becomes a separate lien. It was a question of fact, to be submitted under proper instructions, whether there was only one contract or whether each load was a separate contract. *Stine v. Austin*, 9 Mo. 554; *Viti v. Dixon*,

12 Mo. 482; Livermore v. Wright, 33 Mo. 31; Phillips Mec. Liens, §§ 324, 326; Merchard v. Cook, 4 Greene (Iowa), 115; Diller v. Burger, 68 Pa. St. 432.

S. M. Smith for respondent.

HOUGH, C. J.—The Kansas City, St. Louis & Chicago R. R. Co. is the owner of a railroad extending from Mexico, Missouri, to Kansas City, Missouri. The Chicago & Alton R. R. Co. was the contractor for building said road, and is now the lessee thereof; Moraghan, Sims & Co. were sub-contractors under the Chicago & Alton R. R. Co. for building a portion of said road; and this suit was brought against said sub-contractors, contractor and lessee, and owner, to recover the price of 460 barrels of cement sold by the plaintiffs to said Moraghan, Sims & Co. to be used in the construction of said road, and to establish a lien on said railroad therefor under the statute. The trial was before the court without the aid of a jury, and resulted in a verdict for the plaintiffs for \$900.

The return of service of notice of the lien on one of the defendants, is as follows: "Served this notice in the city of St. Louis on the 5th day of October, 1878, by delivering a copy thereof to R. P. Tansey, secretary of the Kansas City, St. Louis & Chicago R. R. Co., the president thereof being absent from the city and could not be found." (Signed) "John Finn, sheriff city of St. Louis."

Six cars of cement containing eighty barrels each, and one car containing sixty barrels, making in all 540 barrels were furnished by the plaintiffs to the sub-contractors, of which forty or fifty barrels were returned by said sub-contractors to themselves at St. Louis. The testimony shows that all the cement charged for in plaintiffs' account was used in the construction of the road, and that part thereof was furnished more than ninety days before the 10th day of October, 1878, the day on which the lien was filed. There was also testimony tending to show that each car-load was a separate and distinct purchase.

The principal questions presented for determination relate to the service of notice on the Kansas City, St. Louis & Chicago R. R. Co., and the action of the court in refusing instructions numbered eight and ten, asked by the defendant, which are as follows:

8. If each bill of cement was furnished Moraghan, Sims & Co., by plaintiffs under a separate contract, then no such bill can constitute a lien on the railroad, unless it was furnished within ninety days next before the 10th day of October.

10. If the cement was ordered in car-load lots, each order being separate and independent of any other, and in like manner each invoice became due and payable upon shipment, or in any particular time after, then they were separate and distinct trans-

actions, and not one contract, and the rule of the last item in the account giving life to the whole account, does not apply, and no lien exists for any material furnished more than ninety days prior to October 10th, 1878.

It is provided by law how and upon whom all writs of summons and all notices, orders and rules in the progress of any cause directed to a corporation, shall be served; but there is no statute of this State prescribing upon what officer, or officers of a domestic corporation notices shall be served which are required by law to be served before the institution of a suit in order to fix a lien or give a right of action. In the absence of any legislative enactment providing how such notices shall be served, it would seem reasonable to hold that when service cannot be had on the chief officer, or managing agent of the corporation, service on any officer whose official relation to the governing body or managing agent or chief officer of the corporation, would make it his duty to communicate such notice to such body, agent or officer, will be sufficient. We regard the secretary of a corporation as such an officer, and, therefore, hold the service of notice therein recited to be sufficient.

The two instructions above set forth should have been given, as they announce correct principles of law, and there was sufficient testimony upon which to base them. *Livermore v. Wright*, 38 Mo. 31; *Allen v. Frumet Mining and Smelting Co.*, 73 Mo. 688.

It has also been contended in argument that as the law only gives a lien for the materials furnished to the railroad company, whose road is being constructed, the plaintiff could acquire no right to a lien for materials furnished by them to the sub-contractors, *Moraghan, Sims & Co.* Materials furnished to a contractor for the construction of a railroad, and used by him in the construction of such road are in the eye of the law furnished to the railroad.

For error committed by the court in refusing to give the 8th and 10th instructions, asked by the defendants, the judgment will be reversed and the cause remanded. The other judges concur.

MYER & HAY

v.

DUPONT et al.

(79 *Kentucky Reports*, 416.)

Where a railroad company has contracted with a subscriber to its capital stock to apply the subscription to the construction of a particular part of its road, a contractor who has done the work on that part of the road under a

contract with the company has no lien on the subscription to secure the payment of his claim, unless he has contracted therefor, and the president and directors of the company are not liable for the appropriation of the subscription to the payment of other debts of the company so long as the subscriber does not complain.

If such a trust exists in favor of the contractor, he cannot enforce it without alleging that a sufficient amount to pay his claim remains in the hands of the company after constructing the portion of the road to which the subscription was to be applied.

APPEAL from Louisville Chancery Court.

D. M. Rodman for appellants.

H. C. Pindell for appellees.

PRYOR, J.—There is no question but the president and directors of the Elizabethtown & Paducah R. R. Co. can be made individually liable for a fraudulent, and even for a wrongful or illegal appropriation of the corporate funds of the company. The question arises in this case, are the facts alleged in the petition sufficient to create such a liability. The subscription of one million of dollars made to the capital stock of the company by the city of Louisville was to be paid or realized by the issuance of the bonds of the city, the bonds to be sold by the president and directors, and when sold the proceeds to be paid to the commissioners of the sinking fund of the city, and to be paid by these commissioners to the president of the company upon or for work in the construction of forty-five miles of continuous road, beginning at the city of Louisville. In other words, the money was to be paid as the work progressed, one half to be paid when the chief engineer certified that this much is due for work completed on the first thirty miles of the road, beginning at Louisville, and the other half to be paid upon a similar statement by the engineer that the same is due for work actually done on the remainder of the road; and if the amount so dedicated to the construction of either part of the road shall be more than is necessary for that purpose, it may be applied to the construction of other parts of the road. The company was also required to execute an obligation to the effect that the proceeds of the bonds would be thus applied, and in no event, as provided by the ninth section of the ordinance constituting the contract between the parties, was the subscription of stock to be subjected to the present mortgage of the Elizabethtown and Paducah road.

The object of the city of Louisville was to secure the application of the funds subscribed to the construction of the road next to the city, and for this purpose the sinking-fund commissioners were required to retain possession of the funds, and pay them out to the president as the work progressed, in the manner specified by the ordinance.

After this contract had been made by the company and the city,

in pursuance of the act of February 18th, 1873, the present appellants entered into a contract with the railroad company, by which they undertook to construct two sections of the road within thirty miles of the city for \$68,000, to be paid them as the work progressed, the company retaining fifteen per centum of the amount actually due until their entire contract was completed. It is alleged that the company had in its possession a sum sufficient out of the proceeds of the bonds to pay them in full; that they had completed their contract, and there was still due them \$13,000; that it was the duty of the directors to have paid them out of this fund; but in disregard of that duty they had fraudulently and illegally taken the money, and paid it as interest on the old mortgage of the Elizabethtown & Paducah R. R. Co., not leaving enough to pay any part of the balance due the appellants. That the company had gone into bankruptcy, was insolvent, and the president and directors, by reason of their wrongful and fraudulent acts, were personally liable, etc. The contract made between appellants and the company is made part of the petition. This contract prescribes the manner in which the work is to be done, the mode of payment, etc., but contains no stipulation by which the proceeds of the bonds in the hands of the sinking-fund commissioners are assigned to the appellants, or any lien given them on this fund to secure its payment. The city of Louisville is not complaining or a party to the action, nor is there any allegation that the road has not been completed, or the work done as agreed on by the company and the city; but, on the contrary, the legitimate inference from the facts stated is, that the road has been completed, and the proceeds of the bonds, or a part of them, applied in discharging the debts of the corporation. The contract between the city of Louisville and the appellees or the railroad company created no trust in favor of the contractors by reason of work done on this particular part of the road. It is true the fund belonged to the corporation, and when diverted from its legitimate purpose by the directors—that is, used for purposes other than the construction of the road, or in payment of debts due by the corporation—the directors would have been individually liable.

The appropriation of this fund to the construction of a particular part of the road was to secure the city of Louisville, and when the contract between the city and the railroad company has been complied with, the contractor has no right to complain. He may have contracted upon the faith that this fund would build the road the distance contemplated, and that the subscription would insure the solvency of the corporation; still he had no lien upon the fund or the right to demand that the money paid him by the company should come from the proceeds of the Louisville bonds.

These appellants were being paid monthly by their contract with the company, when the company was not entitled to receive

any part of the proceeds of the bond, until work of the value or one half the proceeds had been completed on the first thirty miles, and work of the value of the remaining half on another part of the road. So the appellants were being paid monthly until the work had progressed to its completion, and now they insist that one hundred and twenty thousand dollars of the proceeds of the bonds had been paid on the old mortgage executed by the company, and for that reason the president and directors are individually liable. The proceeds may have been invested in this way, and yet the company have paid out a much larger sum from its own pocket than the proceeds used in paying the mortgage debts.

If the appellants have a lien, or if there is a trust created by reason of their relation to the original contracting parties, no recovery can be had in the absence of an allegation that, after expending the amount of means subscribed by the city of Louisville in the construction of the road, they still had a sum sufficient left in their hands, or that had been appropriated to other purposes, to pay appellants' debt.

What is the difference between paying out the actual proceeds of these bonds and a sum equivalent to the proceeds? And if they had paid a sum equal to the Louisville subscription out of the company's pocket, why had not the company the right to pay off the mortgage if the sum realized was sufficient for that purpose?

It is not a violent presumption to say that the road had been constructed by the company, or the contract complied with; and when the city had been satisfied, the appellants were no more beneficiaries of the fund than any other contractor on the road. As creditors of the company, they were interested in having the funds of the corporation applied to the payment of the corporate debt, and when this fund has been misapplied the directors are liable.

In the case of the *Shakers v. Underwood*, an officer of the bank had misapplied the funds belonging to the depositor by converting them to the bank's use. So in this case: if the money of the corporation is converted by the appellees in the payment of their own debts, or in the construction of some other public improvement, a liability would exist; or, as in the cases of *Gratz v. Redd*, 4 B. M., and *L. & O. R. R. Co. v. Bridges*, 7 B. M., where the directors and stockholders constituting the corporation, instead of paying the debts of the corporation, took the money and sunk it in their own pockets; or where the sheriff has property of the principal in his possession to pay a debt for which the surety is liable, and destroys it or surrenders it to the debtor—in all these cases the legal rights of the parties are affected by the act of the party complained of.

Not so in the present case. The appellants are not liable for

any debt to the appellees or the city of Louisville, nor has either of them any property pledged to secure any debt owing the appellant, but the debtor is complained of for not paying out of his own means a debt due the appellant in preference to another creditor of the same debtor.

Here the effort is to make the president and directors liable for paying debts by the company—the same company with which the appellants contracted. The city of Louisville requires the money subscribed to be applied to the building of the road within certain limits; the county of Hardin upon condition that its subscription is applied to constructing the road within its limits; and A as an individual on condition that the money subscribed by him is to be applied to the building of the road through his farm.

It is now maintained that for the labor performed upon those parts of the road designated for the application of the money, the laborer or contractor performing the work, although he makes an independent contract having no reference to the fund, is the sole beneficiary of the fund, and that the directors are individually liable if they apply it in any other mode, although it is done by the consent of the parties with whom they or the company contracted.

The company was under no obligation to pay the appellants out of this fund. They were not parties to the contract, and there was no trust, express or implied, that the company should pay it to the appellants, or that they were to become the beneficiaries of the fund, or any part of it. Suppose the city of Louisville had the right to have used these bonds by changing the contract on other parts of the road, as would have been the case with an individual subscription, will it be contended that the appellants had such an interest in it as to prevent this change of contract between the city and the company? We think not; and as to all parties but the city of Louisville, the company, when it obtained the money, had the right to use it for any purpose connected with the corporation, either in the construction of the road or the payment of its debts. Nor was the company, by the terms of the contract with the city, prevented from applying the money to the payment of the mortgage debt. This mortgage had been made, including doubtless all the rights and franchises of the company, and the one million dollars of stock about to be taken was understood not to be embraced by the terms of the mortgage; that no right to this stock or the subscription passed to the mortgagees, and if such had been the contract, if the road had been constructed with the company's own means, instead of the money from the proceeds of the bonds, the company had the right to apply it to the payment of the mortgage debt. The city, however, has its stock; at least that corporation makes no complaint of the action of the directors,

and the appellant has no right to make directors personally liable because they pay one debt of the corporation in preference to the other.

It is no misappropriation of the funds of a corporation by the directors when the funds are used in good faith for the corporate purposes. To pay one debt when they could have paid another, thereby giving a preference, is not a fraudulent act on the part of the directors. It is not sufficient to allege that the directors have fraudulently misappropriated the funds of the company. It must appear in what way the fraud was perpetrated. It is said the fraud consists in paying a certain sum of money on the mortgage debt. That, as we have already seen, is not fraudulent. The company had the right to dispose of it in that way, if the city with whom it had contracted had been indemnified by the construction of the road. A third party has no right to complain when the city is silent; and besides, if a trust existed, it must be alleged that the company had, or ought to have had, a sufficient sum in its hands of this fund, after the construction of the road, to pay appellant. It had the right to apply the means to the construction of forty-five miles of the road. The road is built. Now, before appellants can recover upon this theory, it must be averred that this much was on hand after the construction. It is an averment indispensable to the maintenance of the action, adopting appellants' theory as the law of the case.

In either aspect of the case the judgment must be affirmed.

CHICAGO AND ALTON R. R. Co.

v.

UNION ROLLING MILL Co.

(108 *United States Reports*, 702.)

Where, in a suit in equity several defendants have independent rights in the subject-matter of the controversy, and one defendant, having answered setting up his particular right, files a cross-bill to enforce it, and the causes proceed together and are heard together, and an interlocutory decree is entered to protect and enforce the rights thus set up, entitled as of both suits, the complainant in the original suit cannot, unless upon consent, dismiss his bill and thus deprive the defendant of the right acquired by the decree.

When one defendant in a suit in equity pleads to the jurisdiction, and another defendant answers setting up independent rights in the subject-matter of the controversy, and no notice is taken of the plea to the jurisdiction, and a final decree is entered sustaining the rights set up in the answer, the complainant cannot have his bill dismissed under the 38th Rule for

failure to reply to the plea: especially when appeal has been taken and the defendant pleading to the jurisdiction is not party to the appeal.

Under the statutes of Illinois, Rev. Stat. Ill. ch. 82, § 51, a person who contracted to deliver rails to a railroad company for use in the construction of its road, the deliveries to extend over a period of time, and who complied with his contract, and who commenced proceedings within six months after the date of the last delivery to enforce a lien therefor under the statute, had a valid lien upon the property superior to that acquired by a trust created between the date of the last delivery of the rails and the commencement of the proceedings to enforce the lien; and such lien was not affected by a special agreement that the contractor should have a lien on the rails till payment, and that the possession of the railroad should be the possession of the contractor; nor by an agreement to give credit to the purchaser beyond the time within which the statutory lien should be enforced, when the purchaser failed to perform the conditions upon which that credit was agreed to be given.

Under the circumstances in this case there was no error in rendering a personal decree against the Chicago & Alton R. R. Co., and awarding execution against it in favor of the contractor.

THE following statement of the case was prepared by the court to precede its opinion.

The original bill in this case was filed January 8th, 1876, by John B. Dumont, a citizen of the State of New Jersey, against the Chicago & Illinois River R. R. Co., the Chicago Railway Construction Co., the Chicago & Alton R. R. Co., and the Union Rolling Mill Co., which, for the sake of brevity, will be called respectively the Illinois River R. R. Co., the Construction Co., the Alton R. R. Co., and the Rolling Mill Co., all corporations organized under the laws of the State of Illinois, and Bradford Hancock, as receiver of the Construction Co., and Corydon Beckwith, both citizens of the State of Illinois.

The purpose of the bill was the foreclosure of a deed of trust. The bill averred in substance as follows: On March 1st, 1875, the Illinois River R. R. Co., claiming to be the owner of a railroad constructed and being constructed between Joliet, Will County, and Streator, in La Salle County, in the State of Illinois, and the Construction Co., claiming to be the owner of certain lands in Grundy County in the same State, entered into an agreement with the Alton R. R. Co. by which the Illinois River R. R. Co. leased its right of way and its railroad constructed and to be constructed, and all its other property, except engines and cars, to the Alton R. R. Co. forever, upon certain terms and conditions therein mentioned. Afterwards, on the same March 1st, 1875, the Illinois River R. R. Co. executed and delivered its bonds of that date with interest coupons attached, one thousand in number, and for \$1000 each, payable thirty years after date, with interest at seven per cent, payable semi-annually, and on the same day, jointly with the Construction Co. and John H. Rice, its trustee, executed a deed of trust to George Straut to secure the payment

of the bonds. The deed of trust conveyed to Straut all the railroad owned or occupied by the Illinois River R. R. Co. between Joliet and the Mazon River, and all the property of every kind (except engines, cars, and tools), however and whenever acquired by it between said points, and the railroad company covenanted by said trust deed that it had a perfect title to the railroad and other property so conveyed, subject only to the lease above mentioned. By the same deed the Construction Co. and Rice, its trustee, conveyed to Straut its lands situate in Grundy County, Illinois, and covenanted that it had good title thereto, and that the lands were free from encumbrances.

Of said one thousand bonds, only those numbered from 1 to 474 inclusive, and from 701 to 1000 inclusive, were issued. The interest on these bonds had not been paid. They were all held either by bona fide purchasers or pledgees.

The deed of trust provided that in case of default in the payment of any interest on the bonds, or in the performance of any covenant in said deed of trust contained to be performed by the Illinois River Co. or the Construction Co., and in case such default should continue six months, then the trustee might take possession of the property conveyed by the deed of trust, and apply the issues and profits thereof to the payment of the liabilities of the Illinois River R. R. Co. and the Construction Co., as therein provided. The covenants of seizin, for quiet enjoyment, and against encumbrances, made by the Illinois River R. R. Co. and the Construction Co. in the deed of trust contained, were broken on March 1st, 1875, and such default had continued more than six months. On March 1st, 1875, the Illinois River R. R. Co. and the Construction Co. were indebted to the Rolling Mill Co. in a large sum of money for materials furnished for the construction of said road, which the Rolling Mill Co. claimed to be a lien thereon, but its claim was subject to the claims of bondholders represented by the complainant.

On September 13th, 1875, John F. Slater, being the holder and owner of bonds numbered from 1 to 474 inclusive, applied to Straut, the trustee, to take such action in the premises as he ought to or might take for the protection of his interest. But Straut, being unable or unwilling to act, resigned his trust, and the complainant was, on September 18th, 1875, in accordance with the provisions of the deed of trust, appointed trustee in his stead, and on September 20th, 1875, Straut conveyed to the complainant, as such trustee, all the property, rights, and powers vested in him by the trust deed.

The prayer of the bill was as follows :

“That an account may be taken of the sum due for principal and interest on said bonds, and of the sums due as liens upon said road, and that the premises described in the deed of trust to

George Straut may, by order of this court, be sold for the payment of the same, and that your orator may have such other and further and different relief as to equity may seem meet."

Answers were filed by the Illinois River R. R. Co., the Construction Co., and the Alton R. R. Co, Corydon Beckwith, and Bradford Hancock, in which they took issue upon the averments of the bill.

On January 13th, 1876, the Rolling Mill Co. filed an answer, claiming to have a first lien on the railroad and property of the Illinois River R. R. Co., averring that, on August 7th, 1874, it made a contract in writing, of that date, with the Illinois River R. R. Co. and the Construction Co. for the sale and delivery, at certain prices therein specified, to said companies of 1600 tons of steel and 2500 tons of iron rails, and certain named quantities of iron splices, spikes, and bolts, all to be delivered by December 1st, 1874.

That contract provided that for these materials sixty thousand dollars in cash should be paid, and, for the balance of the price, the companies purchasing the same should give notes, payable in six, eight, ten and twelve months from their dates respectively, executed by the Illinois River R. R. Co. and guaranteed in full by the Construction Co. and by the stockholders of the Construction Co. in proportion to their stock, and, for the further security of said notes, there should be pledged certain bonds of the Construction Co. for an amount equal to the aggregate principal of said notes, and secured by a deed of trust, made April 1st, 1874, by the Illinois River R. R. Co. and the Construction Co., on the property therein described, constituting the first lien thereon.

It also contains this clause:

"And it is also agreed by said party of the second part that the material so furnished by the said party of the first part shall be used and laid upon the road and road-bed belonging to said Chicago & Illinois River R. R. Co., between the cities of Joliet, in Will County, and Streator, in La Salle County, Illinois; and that until the same be fully paid for, and all of the notes given in payment therefor paid and cancelled, the said party of the first part shall have a lien upon said material furnished by it, and the use and possession of the same by said party of the second part, or either of the corporations constituting the same, or the assignee or assigns of one or both of them shall be the user and possessor of said party of the first part."

The answer of the Rolling Mill Co. further alleged that the company had delivered a large part of the rails, etc., under said contract; that upon the delivery of the last lot, on or about November 12th, 1874, the purchasing companies gave the Rolling Mill Co. notice not to deliver any more rails or other material until the spring of 1875; that the Rolling Mill Co. were always

ready and willing to deliver the remainder of said rails and other material mentioned in said contract, and that on May 7th, 1875, it gave notice to said purchasing companies that the residue of the rails, etc., were ready for delivery, but the companies did not provide cars or vessels for the transportation of said materials, and that, by the terms of the contract, such notice was equivalent to a delivery thereof; and that the Rolling Mill Co. then and thereby complied with its contract, and was entitled to the consideration therein named.

It also alleged that the Rolling Mill Co. had received in part payment of said consideration the sum of \$25,000, and no more, and that the purchasing companies had wholly neglected and refused to pay the Rolling Mill Co. any further sums of money on the contract, and had neglected and refused to deliver to it any of the notes or securities for deferred payments on the rails, etc., as provided in said contract, although requested to do so; and that thereby the whole amount of the purchase money for the rails, etc., had become due and payable.

It further alleged that on May 10th, 1875, the Rolling Mill Co., within the time prescribed by law, filed its bill in the Circuit Court of Will County, Illinois, for the purpose of enforcing its lien, under the statutes of Illinois, upon the railroad and its appurtenances, and that the bill was still pending and undetermined.

The answer still further alleged that the Rolling Mill Co. not only had a statutory lien upon all the materials furnished under said contract, but by the contract it had an express contract lien upon the same, and that, by virtue of the contract and the facts set forth, it had a lien upon the Illinois River R. R. and its appurtenances paramount to the lien of the bondholders under said deed of trust and all other liens upon the road.

On the same day on which its answer was filed the Rolling Mill Co. obtained leave to file, and did file, a cross-bill in the cause, setting up the same matters stated in its answer, and praying that upon the final hearing a decree might be entered requiring payment of the amount due to it within a certain time to be fixed by the decree, and that in default thereof the railroad of the Illinois River R. R. Co. and all its appurtenances might be sold, and out of the proceeds its claim might be paid in preference to the bondholders or any other persons.

The answers to the cross-bill of the Rolling Mill Co. denied that said company had any lien for the materials furnished by it under said contract, either by virtue of the contract or the statutes of Illinois.

Afterwards, on May 31st, 1876, the master to whom the cause had been referred, filed his report upon the claims of the Rolling Mill Co., with the testimony in support thereof, by which he found due to the complainant in the cross-bill from the Illinois River R.

R. Co. and the Construction Co., for iron rails, etc., furnished under said contract, with interest, etc., the sum of \$186,783.49, and for which he reported the Rolling Mill Co. had a lien binding on all the defendants.

On June 27th, 1876, the report of the master was referred back to him by the following order, which was entitled both of the original and the cross-cause:

"By agreement of counsel the report of the master in said bill and cross-bill is referred back to Henry W. Bishop, the master in chancery of this court, with leave for the complainant in said bill and the defendants to take further proofs within eight (8) days from this date, and for the Union Rolling Mill to take further proofs, if desired, within twelve (12) days from this date, said master to report at the expiration of said twelve days."

On July 1st, 1876, Dumont, the complainant in the original bill, filed his supplemental bill, in which he averred that, since the filing of the original bill, coupons attached to the bonds mentioned, falling due on March 1st, 1876, had become due, and remained unpaid, although presented for payment; that he had paid out certain sums for right of way, for laying down side tracks and switches, and for taxes, and prayed that an account might be taken of the sums due on said coupons so fallen due, and of the sums paid out by complainant as aforesaid, and that the latter might be declared a lien on the mortgaged premises.

On August 3d, 1876, the Illinois River R. R. Co. filed its plea to the original and supplemental bills, in which it averred that at the date of the mortgage set forth in the original and supplemental bills, and at the beginning of this suit, the said George Straut, the trustee named in the deed of mortgage, was and ever since had been and still continued to be a citizen of the State of Illinois; that he was such citizen on September 13th, 1875, when he was applied to to foreclose the deed of trust, and on September 13th, 1875, when he resigned said trust; that from and after March 1st, 1875, until the commencement of this suit, all the defendants to the original and supplemental bills had been citizens of the State of Illinois, and had continuously remained such citizens until the filing of the plea. Wherefore, the said company averred that Dumont, as assignee of said chose in action, namely, said deed of trust, had no standing to prosecute the said suit, and set up the facts aforesaid in bar of the jurisdiction of the court.

No other plea, answer, or demurrer was ever filed to the supplemental bill by any of the defendants in the cause, nor was said plea to the original and supplemental bill ever replied to or set down for argument.

On June 26th, 1877, one year after the report first filed by him had been recommitted, the master, after re-examining the former testimony, and taking additional testimony, covering in all several

hundred printed pages, and hearing the arguments of counsel, filed his second report, affirming his former findings, and sustaining the allegations of the cross-bill.

On July 16th, 1877, exceptions to this report were filed by Dumont, the complainant in the original bill, the main ground of the exceptions being that the master had erred in reporting that the Rolling Mill Co. was entitled to a first lien on the mortgaged premises for the amount found to be due it.

October 15th, 1877, the following order was entered :

"Now come the parties by their solicitors, and thereupon the original, supplemental, and cross-bills were submitted to the court on printed arguments to be furnished by Messrs. Beckwith and Smith by October 26th inst., by Messrs. Cooper and Packard and Henry Crawford by October 30th inst., by George Campbell by November 20th next, and by Messrs. Beckwith and Smith in reply by November 30th next."

On the 25th day of May, 1878, the Massachusetts Mutual Life Insurance Co., on leave of court, filed an intervening petition in the cause, stating, among other things, that it was the holder of some of the bonds secured by the trust deed to George Straut, and that the complainant, John B. Dumont, was threatening to foreclose the trust deed under the power of sale contained therein, and prayed for an injunction to prevent such sale, and, in accordance with this prayer, an order was entered in the cause on the 25th of May, 1878, restraining Dumont from selling the property included in the trust deed until the further order of the court.

Afterwards, on January 4th, 1878, by agreement of the parties by their solicitors, an order was entered setting aside the order of October 15th, 1877, submitting the exceptions to the master's report upon printed briefs. June 5th, 1878, the exceptions came up for hearing before the court. The hearing continued until June 11th, 1878, when the exceptions were taken under advisement.

On December 16th, 1878, the court entered an interlocutory decree upon the report of the master and the exceptions thereto. This decree was entitled thus :

" John B. Dumont v. Chicago & Illinois River R. R. Co. et al." and " Union Rolling Mill Co. v. John B. Dumont et al."	{ {	In Chancery. Original Bill. Cross-bill.
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By this interlocutory decree the court found due the Rolling Mill Co. \$134,733.23 on account of rails and materials used in the construction of the railroad and not paid for, and that this sum

constituted a lien upon the railroad of the Illinois River R. R. Co., and "upon all its property, real, personal and mixed." The court further found that the Rolling Mill Co. had delivered to said Illinois River R. R. Co. and the Construction Co., iron rails, steel rails, etc., mentioned in the contracts with said Rolling Mill Co. to a large amount, which had been sold by the Illinois River R. R. Co. and the Construction Co. to the Alton R. R. Co., with full knowledge of the lien of said Rolling Mill Co. thereon. That the Alton R. R. Co. had never specially paid for such material, but had converted the same to its own use, and that such rails and other materials were then of the value of \$24,464.92. This sum the court found the Rolling Mill Co. was entitled to have and recover from the Illinois River R. R. Co., the Construction Co., and the Alton R. R. Co., together with the interest thereon, amounting at the date of the decree to the sum of \$29,796.30; and the court reserved for further consideration all questions relative to the enforcement of the lien declared for the sum of \$134,733.23, and relative to the sum of \$29,796.30, found due from the Alton R. R. Co., the Construction Co., and the Illinois River R. R. Co.

Afterwards, on April 15th, 1879, the complainant in the original bill moved for leave to dismiss the same at his own costs, and on September 2d following, the consent of the Massachusetts Mutual Life Insurance Co. and other defendants to the dismissal of the original bill was filed in the cause. On March 29th, 1880, John B. Dumont filed his disclaimer to further prosecute said cause, for the reason, as stated by him, that his interest in the same had ceased and terminated by a proceeding had in the Circuit Court of Will County, Illinois. On the same day the court rendered a final decree in the cause, which was entitled both of the original and cross-cause, and which began as follows:

"This day came the several parties to the said cause and cross-cause, by their respective solicitors." The decree then proceeded to overrule the motion of the complainant Dumont for leave to dismiss the bill, and ordered the payment of the sum of \$134,733.23 to the Rolling Mill Co., found due it by the interlocutory decree theretofore entered, with interest, and in default thereof, that all the railroad, with its appurtenances, of the Illinois River R. R. Co. be sold free and clear of all encumbrances in favor of any of the parties to the suit; the proceeds to be applied, first, to the payment of costs; second, to the payment of the sum so found due the Rolling Mill Co.; and the surplus, if any, to be paid to the clerk of the court. The court further decreed that the Rolling Mill Co. have execution against the Alton R. R. Co., the Illinois River R. R. Co., and the Construction Co., for the sum of \$29,796.30, together with interest thereon from the 16th day of December, 1878, found due to it by the interlocutory decree theretofore entered.

The Massachusetts Mutual Life Insurance Co., as an intervenor in the cause, on June 10th, 1880, took and perfected an appeal from the said decree, and on the next day Dumont and the Alton R. R. Co. appealed from the same decree, the Illinois River R. R. Co., the Construction Co., Hancock and Beckwith having refused to join in said appeal.

By the appeal last mentioned the final decree of the circuit court was brought under review.

S. W. Packard and C. Beckwith for appellants.

Lyman Trumbull for appellee.

Woods, J.—The appellants assign for error—

1. The refusal of the circuit court to dismiss the original bill and the rendition of the final decree in favor of the Rolling Mill Co. and the ordering of the sale of the property of the company to satisfy the same.

2. The finding that the Rolling Mill Co. had a lien upon the railroad and property of the Illinois River R. R. Co. for the amount found to be due it, and that such lien was paramount to the lien of the bonds secured by the trust deed to Strant.

3. The rendition of a personal decree against the Alton R. R. Co. for \$29,796.30, and the awarding of execution thereon.

We shall consider these assignments of error in the order in which they are stated.

The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous.

It may be conceded that when an original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

The rule is stated as follows in Daniell's Chancery Practice, page 793, 5th Am. Ed.:

"After a decree or decretal order the court will not allow a plaintiff to dismiss his own bill, unless upon consent, for all parties are interested in a decree, and any party may take such steps as he may be advised to have the effect of it."

The same writer, page 794, says, that,

"After a decree has been made, of such a kind that other per-

sons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant, on the consent of the other, can obtain an order for the dismissal of the bill."

The rule, as we have stated it, is sustained by many adjudicated cases. It was laid down by the Lord Chancellor in *Cooper v. Lewis*, 2 Phillips Ch. 181, as follows:

"The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff."

In *Bank v. Rose*, 1 Rich. Eq. (S. C.) 294, it was said:

"But whenever, in the progress of a cause, the defendant entitles himself to a decree, either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted."

So in the case of *Connor v. Drake*, 1 Ohio St. 170, the Supreme Court of Ohio, declared:

"The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties, as well the defendant as the complainant. After a defendant has been put to trouble in making his defence, if in the progress of the case rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court as well as with the rights of defendants. We think the court did not err in its ruling in refusing to permit complainant to dismiss his bill."

Chancellor Walworth in the case of *Wall v. Crawford*, 11, Paige, 472, laid down the rule in these words:

"Before any decree or decretal order has been made in a suit in chancery, by which a defendant therein has acquired rights, the complainant is at liberty to dismiss his bill upon payment of costs; but after a decree has been made by which a defendant has acquired rights, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights. The complainant in such a case cannot dismiss without the consent of all parties interested in the decree, nor even with such consent, without a rehearing, or upon a special order to be made by the court."

See also *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Bluck v. Colnaghi*, 9 Sim. Ch. 411; *Dashley v. Hogg*, 11 Ves. Jr. 602; *Booth v. Lye-caster*, 1 Keen's Ch. 255; *Biscoe v. Brett*, 2 Vesey & B. 377; *Collins v. Greaves*, 5 Hare, 596; *Gregory v. Spencer*, 11 Beav. 143;

Carrington v. Holly, 1 Dick. 280; *Anon.*, 11 Ves. Jr. 169; *Cozzens v. Siason*, 5 R. L. 489; *Opdyke v. Doyle*, 7 R. L. 461; *The Atlas Bank v. Nahant Bank*, 23 Pick. 491; *Bethia v. M'Kay*, *Cheve's Eq. (S. C.)* 96; *Sayer's Appeal*, 79 Penn. St.; *Seymour v. Jerome*, *Walk. Mich. Ch.* 356.

The authorities cited sustain the refusal of the circuit court to allow Dumont to dismiss his bill. The only really contested issue in the case was between Dumont, representing the bondholders, and the Rolling Mill Co. The answers of all the other defendants simply required proof of the averments of the bill, neither admitting nor denying them. The issue raised by the averments of the original bill and the answer of the Rolling Mill Co., and by the cross-bill of the Rolling Mill Co. and the answer of Dumont, the complainant in the original bill, was whether the Rolling Mill Co. had a lien upon the road and property of the Illinois River R. R. Co., and whether such lien was superior to that of the trust deed executed to Strant, which the original bill was filed to foreclose. The issues thus raised involved the rights of all the parties to the suit. This issue was referred to a master to take testimony and report. He filed a report which was entitled both of the original and cross-cause. The record shows that, "by agreement of counsel, the report of the master in said bill and cross-bill was referred back to him," with leave to the parties to take further proofs; that after taking a large mass of additional evidence, covering several hundred printed pages, the master reported that the Rolling Mill Co. had a statutory lien upon the property covered by the trust deed executed to Strant, and that the same was consequently the first lien upon the property. Joint exceptions were filed to this report by Dumont, the original complainant, and the Alton R. R. Co. and the Illinois River R. R. Co., all of which were entitled both of the original and cross-cause. After full argument, the court overruled the exceptions and rendered an interlocutory decree in both the original and cross-cause, establishing the lien of the Rolling Mill Co. as claimed in its answer to the original bill and in its cross-bill. After all these proceedings, and when the controversy between the parties was practically ended by the interlocutory decree of the court, the motion to dismiss his original bill was made by Dumont, the complainant therein. The Rolling Mill Co. insisted that if the original bill, carrying with it the cross-bill, were dismissed, its claim would be barred by the statute of limitations. It would be hard to conceive of a clearer case for the application of the rule laid down by the authorities we have cited. If the court under these circumstances, had allowed the original bill to be dismissed without the consent of the Rolling Mill Co., it would have inflicted a palpable wrong on that company, and trifled with the administration of justice.

The fact that the Rolling Mill Co. had been compelled to file a cross-bill in order to secure complete relief, only strengthens the case against the dismissal of the original bill. Several of the authorities cited to show that an original bill cannot be dismissed after decree, apply to cases where a cross-bill has been filed. *Bank v. Rose*, 1 Rich. and *Watt v. Crawford*, 11 Paige, *ubi supra*.

But counsel for appellants insist on the right of Dumont to dismiss his original bill, because a supplemental bill had been filed, to which, as well as to the original bill, the Illinois River R. R. Co. had filed a plea denying the jurisdiction of the court; that the truth and sufficiency of this plea were admitted by the complainant, because he failed to reply thereto, or set it down for argument by the next succeeding rule day, or to obtain further time for that purpose from the court; and that therefore, under the 38th equity rule, the bill should have been dismissed "as of course" by the court.

It is to be observed that the plea referred to was filed by the Illinois River R. R. Co., which is not a party to this appeal, and which never asked the dismissal of the original bill, because its plea had not been put at issue or set down for argument. Under these circumstances it would be a strange application of the 38th rule to hold that the complainant had the right to dismiss his bill after the cause had been decided against him.

It plainly appears from the record that after such plea was filed by the Illinois R. R. Co. no notice was taken of it by any of the parties, the cause was allowed to proceed as if it had never been filed, and was decided upon the issues raised by the answer and cross-bill of the Rolling Mill Co. The complainant now insists that his bill should have been dismissed, carrying with it the decree of the court in favor of the Rolling Mill Co., the cross-bill, and the issues raised upon it, and the great mass of testimony in the case, in the taking of which he had participated, because of his own neglect to reply to a plea filed by another party, which itself never insisted upon the dismissal of the bill by reason of that neglect. The only party which could assign for error the refusal of the court to dismiss the bill on account of the default of the original complainant in not replying to or setting down the plea, is the Illinois River R. R. Co., by which the plea was filed. But it has never taken any exception to the refusal of the court to dismiss the bill, and is not a party to this appeal. For the reasons stated we think the circuit court did right in overruling the application of Dumont for leave to dismiss his bill.

It is next insisted that the court erred in entering a final decree in favor of the Rolling Mill Co. and ordering a sale of the property of the railroad company to satisfy the same.

The ground of this contention is that the final decree was rendered upon the cross-bill only, and not upon the original bill, and that if the cross-bill only were considered the court had no jurisdiction thereof by reason of want of the requisite citizenship of the parties thereto, and that no decree could be rendered upon the cross-bill, except as consequent upon a decree in the original cause. This objection proceeds upon an assumption not sustained by the record. The cause was heard at the same time upon both the original and cross-bills. The issue was whether or not the lien of the Rolling Mill Co. was prior to the bonds secured by the deed of trust. This was raised both by the original and cross-bills. The prayer of the original bill was that an account might be taken of the sums due for principal and interest on the bonds secured by the trust deed to Straut, and of the sums due as liens upon the railroad, and that it might be sold for the payment of the same. The issues raised by the original bill and the answer of the Rolling Mill Co., and upon the cross-bill of the Rolling Mill Co. were found by the court in favor of the company upon a hearing of both the original and cross-bills. The court decided in favor of the Rolling Mill Co., granting it the relief prayed in its cross-bill. It is true the complainant, in his original bill, did not ask for a decree upon the final hearing in his favor. But the cause having been heard on both the original and cross-bills, he could not prevent the granting of the relief prayed by the cross-bill, either by dismissing his bill or by not asking for a decree.

The original bill was not dismissed, but is still pending, and the complainant in that bill may still apply in behalf of the holders of bonds secured by the trust deed to Straut for such part of the proceeds of the sale as the final decree orders to be paid to the clerk of the court. Our conclusion is, therefore, that it was competent for the court to render the final decree made in this case.

The next question presented by the assignments of error is whether the Rolling Mill Co. had a lien upon the railroad and other property of the Illinois River R. R. Co. superior to the deed of trust to Straut and the lease to the Alton R. R. Co.

The matter of liens upon railroads is regulated by the Revised Statutes of Illinois, chapter 82, sec. 51, in force when the contract of August 7th, 1874, for the delivery of iron rails was made, and on March 1st, 1875, when the trust deed to Straut was executed, which declares:

"That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation now existing, or hereafter to be organized under the laws of this State, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed, or

shall hereafter do and perform, any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same shall have a lien upon all the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor, provided suit shall be commenced within six months after such contractor or laborer shall have completed his contract with said railroad corporation, or after such labor shall have been performed or material furnished."

The Rolling Mill Co. began to deliver to the Illinois River R. R. Co. on September 1st, 1874, iron rails and other material to be used in the construction of its road, and continued such delivery until November 11th, 1874. The material so furnished, of the value of \$107,785.09, was used in the construction of the railroad. Within less than six months from November 12th, 1874, the date when the last material was delivered, the Rolling Mill Co. filed in the proper court its bill of complaint to enforce its lien under said statute. The lease of its road made by the Illinois River R. R. Co. to the Alton R. R. Co., and its deed of trust to George Straut were not executed until March 1st, 1875, long after the delivery of said material had been commenced. The lien of the Rolling Mill Co. under the statute would therefore seem to be complete and superior to that of the trust deed and lease.

The appellants, however, contend that the Rolling Mill Co. waived its lien by the contract between it and the Construction Co. and the Alton R. R. Co. of August 7th, 1874, by which it was stipulated that the rails and other materials furnished by the Rolling Mill Co. should be used in the construction of the railroad of the Illinois River R. R. Co., and that until fully paid for the Rolling Mill Co. should have a lien thereon, and that the possession thereof by the railroad company should be the possession of the Rolling Mill Co.

We do not think that this stipulation shows any purpose on the part of the Rolling Mill Co. to waive its statutory lien. When the contract was made, the railroad for which the materials were to be furnished was in contemplation only. The survey of its route had not been completed, nor had the right of way been obtained. The evident purpose of the stipulation was to secure a specific lien on the materials furnished, and to require them to be used in the construction of the railroad where they would be subject to the statutory lien, and the facts of this case show that this was a wise precaution. The contract, therefore, so far from showing a waiver of the statutory lien, shows a purpose on the part of

the Rolling Mill Co. to retain it. The statutory lien was, therefore, not lost. On this question the case of *Clark v. Moore*, 64 Ill. 279, is in point. In that case the Supreme Court of Illinois says:

"It is also insisted that appellees waived their lien when they sold the property, by reserving a lien upon it in a written contract; that they thereby received and held additional security, that operated to destroy any lien that would otherwise have attached. It is true that where a laborer or materialman receives security collateral to the property improved, whether the security be personal or a mortgage on or a pledge of other property or chose in action, the law presumes that it was intended to waive or release the lien upon the premises. In their effort to retain a lien on the machinery furnished by appellees, they took no collateral or independent security. It was but a futile effort to retain a superior lien on the property furnished over and above other lienholders. Had these parties taken a mortgage on these lots and the building, which the law would have adjudged void, would any one claim that they could not assert their lien? The lien attaches to and encumbers the property to improve which the material is furnished, and the effort to acquire a more specific and exclusive lien thereon in no wise manifests an intention to release the property from all liens and look to other security for payment, but it shows the very opposite intention, an intention to hold, if possible, the property liable for the payment of their claim."

This authority decides the question in hand against the appellants, and is entitled to great, if not conclusive, weight in this court.

The appellants further contend that the Rolling Mill Co., by the contract of August 7th, 1874, gave credit for the materials to be purchased by it, which extended beyond the time within which suit would have to be brought to fix and enforce the statutory lien, and that this fact shows conclusively that the statutory lien was waived.

It is well settled that an agreement for the extension of credit by receiving a note of the party, or the independent security of a third person, falling due at a day beyond the period within which the lien must be asserted, will be no waiver when the agreement to give the note or security has not been performed by the promisor. To hold otherwise would be to say that the builder or materialman must have intended to waive his lien in the event of a refusal to comply with the agreement. On the debtor's refusal to keep the agreement, the builder or materialman ought not to be bound by it, but should be remitted to his rights, independently of the contract. *The Highlander*, 4 Blatch. 55.

It is clear from the terms of the contract that the Rolling Mill Co. never agreed to extend credit for the materials furnished unless notes were given therefor, with the stockholders of the Con-

struction Co. as indorsers, and with the bonds of the Construction Co. secured by the deed of trust to Norton as collateral security. The contract to give credit was clearly conditioned upon the delivery of the notes and bonds. It would be absurd to hold that, on the failure to deliver them, the Rolling Mill Co. had nothing to show for its iron rails and other materials, but the promise of an insolvent railroad company and an insolvent construction company to deliver the notes and bonds. They were as impotent to deliver the notes and bonds as they were to pay cash. Such could not have been the intention of the parties to the contract. On the failure of the companies to deliver the notes and bonds according to the contract, the Rolling Mill Co. was entitled to immediate payment and to its statutory lien to secure it, because the credit was conditioned upon the giving of security, and the security was not given. It has been so held by the Supreme Court of Illinois in the case of *Gardner v. Hall*, 29 Ill. 277. Gardner filed his petition to enforce a mechanics' lien on a contract for doing certain work. The contract provided that payment of a certain instalment due upon a day named should be postponed for a period extending more than a year after the completion of the work in case a mortgage on the premises should be given to secure said instalment. The petition was demurred to, and the demurrer was sustained. On appeal this decree was reversed, and the supreme court said:

“An agreement was made to give a mortgage which would have destroyed the lien, but no mortgage was given, and hence the lien remained. So was an agreement made to extend the time of payment which would destroy the lien. But the mortgage was not executed, hence the time was never extended and the lien never waived thereby.” See also *The Highlander*, 4 Blatchf. ubi supra.

We are of opinion, therefore, that as the purchasing companies did not perform the condition upon which credit was to be given, no credit at all was given, much less a credit extending beyond the time for the enforcement of the statutory lien.

It follows from these views that the contention of appellant that the suit begun May 10th, 1875, by the Rolling Mill Co. to fix and foreclose its statutory lien, was brought before the cause of action accrued, and cannot, therefore, be treated as a compliance with the statute, cannot be sustained, for at that date the debt was due and the lien in force.

In our opinion the Rolling Mill Co. had, under the statutes of Illinois, a lien upon the railroad and its appurtenances of the Illinois River R. R. Co. for the value of the materials furnished by it and used in the construction of the railroad, superior to the lien of the trust deed executed to George Straut on March 1st, 1875, and to the lease of said railroad executed on the same day to

the Chicago & Alton R. R. Co., and that the decree of the circuit court ordering the railroad to be sold to pay the sum due for said materials so used was just and right.

It is, lastly, assigned for error, that the circuit court rendered a personal decree against the Alton R. R. Co. in favor of the Rolling Mill Co., and awarded execution thereon.

The personal decree complained of was for \$29,796.30. This sum was the value, with interest, of certain iron rails, etc., sold and delivered by the Rolling Mill Co. to the Illinois River R. R. Co., and the Construction Co., under the contract of August 7th, 1874, which were not used in the construction of the railroad, but were sold by the purchasing companies to the Alton R. R. Co., and by it converted to its own use.

The circuit court found that the Rolling Mill Co. had a lien upon said materials; that the Alton R. R. Co. bought said materials with notice thereof, and had never paid for the same, and had alleged, as a reason for its failure to pay, the want of title in the companies from which it purchased. The facts so found are clearly shown by the record, and do not seem to be disputed. The Alton R. R. Co., however, insists that there was no lien on said materials under the contract of August 7th, 1874, because the contract was not acknowledged and recorded as required by the law of Illinois relating to chattel mortgages.

That act provided as follows:

"That no mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, shall be valid as against the rights and interests of any third person, unless possession thereof shall be delivered to and remain with the grantee, or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument is acknowledged and recorded as hereinafter directed; and every such instrument shall, for the purposes of this act, be deemed a chattel mortgage." Rev. Stat. of Ill., chap. 95, section 1.

The theory of the appellants is that the Illinois River R. R. Co. and the Construction Co., being the owners by purchase of the iron rails, retained possession of the same, and by the contract of August 7th, 1874, gave to the Rolling Mill Co. a chattel mortgage thereon, which was never acknowledged and recorded, and that consequently the lien fails. But the facts of the case are not in accord with this theory. When the contract referred to was made the iron rails were not the property of the purchasing companies. It does not appear that the rails were at that time in existence, and they were certainly not in possession of the purchasing companies. So that this is not the case contemplated by the Illinois statute, which clearly refers to a mortgage on personal property of which the mortgager is owner and of which he is in possession and of which he wishes to retain possession. The case is

that of the owner, namely, the Rolling Mill Co., of personal property, who sells it and delivers the physical possession to its vendee and by the bill of sale retains a contract lien thereon. In such a case it is clear that the original vendor can enforce the lien against a subsequent purchaser who had actual notice of the lien and had not paid for the property, and refused to pay for it on the ground that the first vendee from whom he bought had no title thereto. The chattel-mortgage law above quoted can have no reference to such a case. Such an application of it would be unjust, inequitable, and unreasonable. The law has never been so applied by the courts of Illinois.

We find no error in the proceedings and decrees of the circuit court. They are, therefore, affirmed.

ATTORNEY-GENERAL

v.

Joy.

(*Advance Case, Michigan. October 15, 1884.*)

An act authorizing a certain railroad company to change its name and to purchase the property and franchises of another company, appeared from the legislative journals to have failed to receive the constitutional majority required in one branch of the legislature. On the faith of this act the stockholders proceeded to purchase the rights and franchises of the other company, to complete the road, and to issue and negotiate bonds and mortgages. Under the latter a foreclosure sale took place, and the company was reorganized by the purchasers. All these acts were recognized generally as valid, the legislature granting express authority to the corporation under its new name to perform many of them. A writ of quo warranto having issued against the reorganized corporation nearly thirty years after the passage of the act above referred to, on the ground that said act was not constitutionally passed, *held*, that the defect must be deemed to have been cured by subsequent legislation, and that judgment of ouster would not be entered.

An act enabling a railroad company already formed under a special law to change its name, and under such new name to extend its road, is not within the scope of a constitutional provision that the legislature shall pass no act renewing or extending a special act of incorporation.

An act having been passed entitled "An act in relation to mortgages against preferred stock in, and the delivery of goods by railroad companies," the validity of the same was attacked nearly thirty years after its passage on the ground that there were two objects expressed in the title. *Held*, that probably the mistake was inadvertent, and that at any rate the court would not, after the lapse of time, consider the objection.

An act repealing portions of a general railway law will not be deemed to apply in cases where there has been a special act of incorporation.

An act permitting the creditors of a chartered railroad corporation to en-

force their demands by a sale and transfer of the franchises is not obnoxious because its effect is to create new corporations with the old chartered powers.

COOLEY, C. J.—The information in this case charges the respondents with claiming and usurping the corporate right, liberty, privilege, and franchise known and called "The Detroit, Grand Haven & Milwaukee Ry. Co.," claiming to be organized and incorporated under some act or acts of the territory of Michigan or of the State of Michigan, with being in fact so organized and incorporated, and also the corporate franchises, liberties, and privileges of keeping, maintaining, and operating a railroad extending westward from Pontiac to Grand Haven, and that of levying and receiving tolls and fares from passengers transported on said railroad, and of levying and collecting freight charges for carrying freight in cars upon said railroad, and calls upon them to show by what right they claim to exercise and use such franchises and corporate rights. The defendants have pleaded to the information, setting out in full the title on which they rely. The title relied upon is as follows: (1) The charter of the Detroit & Pontiac R. R. Co. for the building of a railroad from Detroit to Pontiac, which was granted by the territorial council of the Territory of Michigan, March 7, 1834, under which a railroad company was organized, which completed and put in operation a railroad between the towns named by October 1, 1834. (2) The charter of the Oakland & Ottawa R. R. Co., granted April 3, 1848, for the construction of a railroad from Pontiac by way of Fentonville to Lake Michigan, under which a railroad company was organized, the line of the road located, and construction begun. (3) An act of the legislature approved February 13, 1855, whereby the name of the Detroit & Pontiac R. R. Co. was changed to the Detroit & Milwaukee Ry. Co., and the company, for the purpose of forming a continuous line, was authorized to purchase all the rights, property, and franchises of the Oakland & Ottawa R. R. Co. The purchase is alleged to have been made, and thereby the Detroit & Milwaukee Ry. Co. became authorized to own, possess, build, and maintain a continuous line of railroad from Detroit through Pontiac, and by way of Fentonville to Lake Michigan, and did, under the name last aforesaid, publicly use and exercise said corporate rights, privileges, and franchises, and did proceed to complete the building and equipment of such railroad, and did, on November 22, 1858, complete, equip, and put in operation said railroad, so as to form a continuous line of railroad from Detroit through Pontiac, by way of Fentonville, to Grand Haven, on Lake Michigan, and did thereafter continue to operate the same until it was sold on foreclosure, as hereafter stated. (4) It is averred that the legislature, after said act of 1855, did solemnly, by repeated acts of legislation duly passed by votes of more than two thirds of all the members elected to each house thereof, recognize, confirm, and ratify the said act,

and did also recognize and confirm the said Detroit & Milwaukee Ry. Co. as a body corporate, lawfully organized and existing under the provisions of said act.

The subsequent acts are enumerated, and are the following: (a) "An act to authorize the Detroit & Milwaukee Ry. Co. to issue its shares in the kingdom of Great Britain," approved February 14, 1857. (b) "An act disposing of certain grants of land made to the State of Michigan by act of Congress approved June 3, 1856," approved February 14, 1857. (c) "An act to authorize the directors of the Detroit & Milwaukee Ry. Co. to be represented at the board of directors by proxy," approved February 3, 1858. (d) "An act to legalize certain loans made by the Detroit & Milwaukee Ry. Co., and to permit further loans," approved January 29, 1859. (e) "An act to authorize the Detroit & Milwaukee Ry. Co. to purchase the property, rights, and franchises of the Port Huron & Milwaukee Ry. Co.," approved January 29, 1859. (f) "An act to authorize the Detroit & Milwaukee R. R. Co. to issue stock in place of the original stock of the Detroit & Milwaukee Ry. Co.," approved March 4, 1861.

The plea then avers the borrowing of money in 1855, and afterwards, by the Detroit & Milwaukee Ry. Co., and the giving of mortgages to secure the loans, the foreclosure of certain of the mortgages, and the sale of the railroad, with its appurtenances, on October 4, 1860, to Thomas Reynolds and William Gray, and the subsequent reorganization of the company by the purchasers under the name of "The Detroit & Milwaukee R. R. Co." Also a subsequent foreclosure, but of prior mortgages, under which, on September 4, 1878, the railroad, with its appurtenances and franchises, was again sold to Samuel Barker and others, who reorganized the same under the name of "The Detroit, Grand Haven & Milwaukee Ry. Co.," and that thereby the said Detroit, Grand Haven & Milwaukee Ry. Co., became and is a lawful corporation, possessed of all the franchises and privileges of said Detroit & Milwaukee R. R. Co., and authorized to maintain said railroad, with its appurtenances, franchises, and privileges, and that the respondents have been and are stockholders and directors thereof, and as such they lawfully claim and exercise the franchises in question.

Such is the title upon which the respondents rely.

The Attorney-General has demurred to the plea, and the case has been brought to a hearing upon demurrer. The question is whether the title set out in the plea is sufficient. The Attorney-General contends that it is not, and points out certain particulars in which it is supposed to be defective.

1. It is said that the act of February 13, 1855, through which the Detroit & Milwaukee Ry. Co. made claim to the franchises and privileges which had before that date pertained and belonged to the Detroit & Pontiac R. R. Co., and to the Oakland & Ottawa

R. R. Co., was never constitutionally passed, and therefore never became a law at all, but was a mere nullity. The act was one purporting to amend or alter a corporate charter, and therefore, under the constitution (article 15, § 8), required the assent of two thirds of the members elected to each house. Referring to the legislative journals, they seem to show that the affirmative vote in the lower house lacked one of the necessary two thirds. Consequently, it is said, the Detroit & Pontiac R. R. Co. never acquired the franchises of the Oakland & Ottawa R. R. Co., and the Detroit & Milwaukee Ry. Co. was never legally organized. This is a somewhat startling proposition, in view of the vast interest that may be affected by its being sustained, and we have listened with great interest to the views which have been advanced in its support. And it must be conceded that if we look no further than the act now under consideration, the *prima facie* case is with the Attorney-General. A bill considered in the legislature, but not constitutionally passed, can never become a law by its being signed by the Governor and published with the statutes. That is too plain a proposition to need argument or illustration. But it is a surprising fact, if the vote was insufficient, that the question of invalidity was not sooner raised. Nothing was better understood at the date of the act in question than the requirement of the constitution in respect to the amendment of corporate charters; the subject had been largely discussed when the constitution was before the people for adoption five years before, and the provision on the subject was regarded as of great importance. There was a considerable vote in opposition to the act in question, and if the vote in its favor was insufficient, it seems strange that attention was not challenged to the fact immediately. It is customary in this State to publish the daily journals of the legislature in full, and to place printed copies on the desks of members on the morning of the day succeeding the one whose proceedings they give; and it seems incredible that if a mistake was made in declaring a bill passed which had not received the necessary vote, the mistake should not have been discovered as early as the day following. When the circumstances and the legislative custom are taken into consideration, there is much ground for the suggestion which is made on the part of respondents, that a mistake occurred in the making up or printing of the journal, and that the mistake probably consisted in the omission of one or more names in giving the final vote. And plausibility is given to the suggestion by the fact that twelve members of the house are not recorded as having voted at all when the bill was put upon its passage. But we cannot now judicially determine that there was any such mistake; the legislative journals furnish no proof of it, and it remains merely a plausible conjecture. We direct our attention, therefore, to the facts occurring since, and which are relied upon as giving validity to the act

of 1855, even though it may not have been constitutionally adopted.

The subsequent facts to be considered embrace—First, the acts of the stockholders in the several railroad companies and of other persons done in reliance upon the act of 1855; and, second, the acts of the State itself in recognition of that act.

And, first, of the acts of stockholders. It appears beyond dispute or cavil that the stockholders in the Detroit & Pontiac and the Oakland & Ottawa railroad companies accepted the act of 1855 and acted upon it as valid legislation; that the one class bargained and paid for the rights and franchises belonging to the other, and the other sold them; that the Detroit & Milwaukee R. R. Co. contracted large debts, which could have had no validity if the corporation was not lawfully organized; that it assumed to issue and sell bonds, and to give mortgages for their security, and that it constructed, equipped, and put in operation a railroad from Pontiac by way of Fentonville to Grand Haven, part of a continuous line from Detroit to Lake Michigan. It also appears that when the bonds of the company failed to be paid, the mortgages were foreclosed, the road and its franchises were sold, as was supposed, and new companies successfully organized by the purchasers to operate the road in reliance upon the franchises. The bonds issued amounted to many millions of dollars; they were sold in the money market of this country and of Europe, and bought in the belief that they were entirely valid; the shares of the company supposed to have succeeded to the property, rights, and franchises of the Detroit & Pontiac R. R. Co. were also, for more than a quarter of a century, dealt in as the shares of lawful corporations possessing the property, rights, and franchises which they assumed to possess. These are unquestioned facts.

Next, as to the acts of the State. To understand and appreciate the full significance of these it is necessary to know that the act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the State itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the State had planned for the construction of several parallel lines of railroad across the State, from east to west, one of which was to be north of the line of the Michigan Central R. R., and was expected to be of very high value, not only to all that part of the State through which it would run, but to the whole State. Much disappointment had come from the road not being constructed; and when the Detroit & Pontiac R. R. Co., which already had nearly 30 miles of road in successful operation, and could command means for the construction of more, proposed, on certain terms which were expressed in the act of 1855, to purchase the rights and franchises of the Oakland & Ottawa R. R. Co., and to extend their own road to Lake

Michigan, there is no reason for doubting that the people of the State at large looked upon this as a favorable opportunity for accomplishing a desire which 20 years before had found expression in the legislation of the State, and which ever since had been kept constantly in view. Keeping this in mind, we may be better able to understand the significance of subsequent legislation.

The first act thereafter passed, which is of importance in this litigation, was a short act, approved February 14, 1857, the purpose of which was to authorize the Detroit & Milwaukee Ry. Co. to establish an office for the transfer of its shares in London or elsewhere in the kingdom of Great Britain. Manifestly, the intent was to facilitate the sale of shares in the money markets of that country. No question is made of the legal adoption of this act, but it was idle legislation if the act of 1855 had no validity. The next act to be mentioned was approved on the same day, and had for one of its objects to confer upon the Detroit & Milwaukee Ry. Co. a certain land grant to aid in the construction of a railroad from Owasso to Grand Haven, being part of the line which had been located by the Oakland & Ottawa R. R. Co., and transferred by that company to the Detroit & Milwaukee. This act makes no reference to the act of 1855, but it was plainly, so far as concerned this grant, supplemental to that act, and could not have been more so had it referred to it in terms. The act of February 3, 1858, authorizing the directors of the Detroit & Milwaukee Ry. Co. to be represented at board meetings by proxy, is only significant as showing continued recognition by the State of that company as a lawful corporation. The act to authorize the Detroit & Milwaukee Ry. Co. to purchase the property, rights, and franchises of the Port Huron & Milwaukee, approved January 29, 1859, was passed in furtherance of the original purpose of the State, that the parallel line of road, north of the Michigan Central, should have an eastern terminus different from that of the latter road. This act was also plainly supplemental to that of 1855. The act to legalize loans made by the Detroit & Milwaukee Ry. Co., which was also approved January 29, 1859, refers to bonds and mortgages issued by the company "in pursuance of its charter," and purported to give to it full power to borrow "such further sum or sums of money as may be necessary to carry out fully the objects and designs of the charter of, and other acts of, the legislature of the State of Michigan in relation to the said Detroit & Milwaukee Ry. Co." But what charter did the company have to which this could refer? The answer, and the only possible answer, is, it had none whatever, except the old charter of the Detroit & Pontiac R. R. Co., which became the Detroit & Milwaukee Ry. Co. by change of name under the permission of the act of 1855. This was the understanding of the shareholders, and it was quite as certainly the understanding of the State.

We need not follow this subject further. No one pretends that any of the legislation subsequent to the act of 1855 was adopted in disregard of constitutional forms. It is, indeed, suggested that the legislature was probably ignorant, at the several times when the subsequent enactments were passed, of the defect in the first act; but no such suggestion is admissible. The foundation of the relator's whole case is that this court must take judicial notice of the journals of the legislature and of the defects in legislative action which they show. But judicial knowledge is not exclusively for the courts; what the judiciary takes notice of, the legislature takes notice of also; and the legislature is just as conclusively presumed to know that a pretended statute was never passed as we are. The case is to be considered, therefore, upon the assumption that the legislature knew in fact what the members were bound in law to know, and that they acted in what was done by them with that knowledge. What is proposed now, in the name of the State, is that the supposed act of 1855, which is now said to be no legislative act at all, though the legislature has often and in the most solemn manner recognized it as valid, shall be rejected and declared null. This is proposed to be done, too, under circumstances appalling. Property to the amount of many millions of dollars, consisting of bonds and other evidences of supposed indebtedness and of supposed corporate shares, would be instantly annihilated, and tangible property to equal value would be left without lawful owner. Very likely many persons not before us to-day, except by indirect representation, might be reduced from supposed affluence to poverty by such a judgment.

If the act of 1855 is annulled, nearly all of the subsequent legislation which has been referred to must fall with it. Much of that legislation was unquestionably adopted in due form and with competent power; but it would fall because it is in its nature supplementary, and is defective or meaningless except in connection with that in reference to which it was enacted. What is asked, therefore, in the name of the State, is not merely that the act of 1855 should be annulled, but that several other acts should, in effect, be set aside also. And this may well raise the question whether it is consistent with the honor and dignity of the State that, under the circumstances, the questions which have been argued should be raised. It has already been seen that the important public purpose which the State had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the State has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit & Milwaukee Ry. Co. upon the market as well in Europe as in this country. The State recognized the necessity, and by its legislation provided for facilitating sales. The

bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this State which appeared to sanction if not to invite it. Concede that purchasers were bound to know that the act of 1855 was a nullity, and it is immaterial to the consideration now suggested, for the subsequent acts recognized the corporation as a lawful body politic, the owner of a great railway, and competent to contract debts and give mortgages, and it was these facts which concerned purchasers of bonds and shares, and upon which they relied in buying. For the State, under such circumstances, to take steps for the annihilation of all these shares and securities by legal decision would have all the appearance of bad faith, and of public repudiation of solemn State engagements. The several acts of legislation were not, indeed, contracts; but when the State, by valid legislation, invites the public to make specified investments, it may well be said that its faith is pledged to do nothing on its part which shall have for its purpose to render the investments worthless.

It may be said, and is said, that there can be no estoppel against the State in respect to such questions; and this is undoubtedly true. It is further said that the questions the court is called upon to decide are purely legal questions. But when the dignity and honor of the State are involved, the judiciary has them in charge quite as much as either of the other departments of the government; one department, as much as another, must see that they suffer no detriment at its hands while it is acting as representative of sovereignty within its constitutional sphere of duty. If, therefore, the appeal to the court is, to any extent, an appeal to the discretion of the court, it becomes its plain duty to see that when it speaks for the State it shall speak the voice of justice, and maintain unimpaired the public faith; and it must do this, even though the legislative or the executive departments were demanding something different. But, in this case, we do not understand that any department of the government has demanded or desired anything different, or that the people, or any part of them, have any wish inconsistent with public faith and integrity. Questions of a legal nature have for some time been made in respect to some of the legislation which has been referred to, and the attorney-general has thought it wise to bring them to the attention of the court for settlement. This was very proper, and does not seem to be complained of. At the same time, it seems equally proper to the court that the consequences of a particular solution, not only to the owners of shares and securities, but to the State itself, should be presented, and that it should be shown that this might possibly be a case in which the argument *ab inconvenienti* should be conclusive. But, treating the questions as purely legal questions, unaffected by the considerations mentioned, we should still be of opin-

ion that no case was made by the relator. If we concede that the act of 1855 was not constitutional when adopted, and that for that reason it was a nullity at the time, it will not follow that it has remained invalid to this time. What the legislature failed at that time to adopt in due form, it had ample power to affirm and validate afterwards, if it saw fit to do so. It might have been confirmed by an act of legislation expressly declaring the intent of the legislature to that effect; but that would be only one method of confirmation. The indirect method, by recognizing and acting upon it as a valid law, and inviting others to do so, might be equally effectual. The question of confirmation is not one of form, but of the expression of legislative will; and when we find the will expressed in any form of words, direct or indirect, it is sufficient. But the legislative will that the act of 1855 should stand and have the effect intended in passing it, has been manifested over and over again during the period of a quarter of a century, and has not, during all that time, been in doubt. We must dismiss this branch of the case as requiring no further consideration or discussion at our hands.

2. But another objection is made to the act of 1855 which goes to its substance. The act, it is said, is in conflict with that provision of the constitution which declares that the legislature shall pass no act renewing or extending a special act of incorporation. Article 15, § 8. The act of 1855, it is said, undertook to do this; and as the legislature could not do it originally, neither could it afterwards confirm and validate the void attempt. We think the relator misconceives the act. It does not purport or attempt to renew or extend any special act of incorporation. The general purpose is to enable the Detroit & Pontiac R. R. Co. to take a new name, and, under such new name, to extend its road from Pontiac to Lake Michigan. There was nothing in this opposed to the constitution, either in letter or spirit. And this answers a further objection, that the act of 1855 created a new corporation in violation of article 15 of section 1 of the constitution. We do not so understand it.

3. It is further contended that an act approved February 10, 1859, under which the railroad company is supposed to have been organized, after the sales on foreclosure, was without validity for that purpose, for the two reasons—First, that it was without validity when passed; and, second, that it has since by implication been repealed. The act is entitled “An act in relation to mortgages against preferred stock in, and the delivery of goods by, railway companies.” Here, it is said, are two objects expressed, and therefore the act is invalid under the constitution (article 4, § 20). This is a somewhat technical objection, and we are not disposed to consider it after this great lapse of time. But it may be proper to remark that the act did not bring together subjects totally foreign

to each other. The whole act concerned railways; and if it can be considered a technical disregard of the constitution, it was probably inadvertent. The repeal of the act is supposed to have been accomplished either by the amendment of the general railroad law by an act passed in 1872 (Sess. Laws, p. 83), or by the general revision of that law in 1873 (Pub. Acts, p. 496), both of which covered the same general subject. But we do not agree in this. Those acts must be understood to refer to companies organized under the general railroad law, while the act of 1859 evidently had other companies in view. It speaks of railway companies,—a term not made use of in the general law, but which the company succeeding the Detroit & Pontiac had taken as a part of its new name.

It is suggested, rather than urged, that the legislature had no constitutional power to pass the act of February 10, 1859, as applicable to chartered corporations, because the effect was to create new corporations with the old chartered powers. But the purpose of the act was to permit the creditors of chartered corporations to enforce their demands by a sale and transfer of the franchises, and this would be impossible if the sale were of itself to operate as a destruction of the franchises. The act merely gave a remedy for the enforcement of debts; and, as franchises were to be sold for the satisfaction of debts, it provided a method whereby they might be kept alive.

We have now considered the question raised, so far as seems necessary to a determination of the main question whether the defendants are guilty of the usurpation charged upon them, and are clearly of opinion that they are not. It may be proper to refer to the case of *Cook v. Detroit, G. H. & M. Ry. Co.*, 43 Mich. 345; a. c., 9 Am. & Eng. R. R. Cas. 443, in which the validity of that corporation was indirectly recognized, though importance is not attached to it except as a part of the public history of the company.

The demurrer is overruled, and judgment must be entered for respondents.

ATTORNEY-GENERAL

v.

ERIE AND KALAMAZOO R. R. Co.

(Advance Case, Michigan. October 8, 1884.)

Whether or not the supreme court will grant leave to the attorney-general to file an information in the nature of a quo warranto to declare the charter of a railroad corporation forfeited because of a failure to operate its road over the whole line, as originally constructed, between the termini named in

the charter, rests largely in the discretion of the court; and where it appears, as in the case of the Erie & Kalamazoo R. R. Co., whose charter it was sought to declare forfeited, that while the failure and refusal to continue to run its trains into and use as a station a village not named as a station in the charter may cause injury to the inhabitants of such village, such discontinuance was brought about by the use of another route by the lessee of the corporation to facilitate the transfer of passengers and freight to a through line of railroad, and that the public at large are not injured by the change, the court may refuse the application.

CHAMPLIN, J.—This is an application by the attorney-general for leave to file an information in the nature of a quo warranto against the Erie & Kalamazoo R. R. Co. Notice was given to the respondent, and it has been heard in opposition to the application. The Erie & Kalamazoo R. R. Co. was chartered by an act of the territorial legislature of Michigan, approved April 22, 1833 (3 Terr. Laws, 1125). The charter was perpetual, but was amended in 1846 so as to authorize the legislature at any time to alter, amend, or repeal it. As originally granted, the charter authorized the company to construct a railroad from Port Lawrence through, or as near as practicable to, the village of Adrian, and thence on the most eligible route to such point on the Kalamazoo river as they may deem most proper and useful. Important additional franchises were conferred upon the company by an amendment of its charter by an act approved March 26, 1835 (3 Terr. Laws, 1392). And by another amendment, made in 1846, they were prohibited from constructing their road beyond the village of Adrian. The charter empowers the company to transport property and persons over their road by the force of steam or other power, and to charge and collect tolls for the same. Under the grant of power conferred by this charter, the Erie & Kalamazoo R. R. Co. located and constructed its road from Port Lawrence (now Toledo) to Adrian. As located and constructed, the road passed through the village of Palmyra, at which a regular passenger and freight depot was established. In 1849 the Erie & Kalamazoo R. R. Co. leased its road and franchises to the Michigan Southern R. R. Co., in perpetuity. The Palmyra & Jacksonburg R. R. Co. was chartered by the territorial legislature when the township of Port Lawrence constituted a portion of Monroe county. After the loss of the "disputed ground" by the act of congress defining the northern boundary of the State of Ohio and admitting the State of Michigan into the Union, and the assent of Michigan thereto, the legislature of this State passed an act by which the State agreed to release certain securities against the Palmyra & Jacksonburg R. R. Co., in consideration that it would release so much of its road as laid between the Michigan Southern road then owned by the State and the Erie & Kalamazoo R. R., and it was enacted that it should not be lawful for the Palmyra & Jacksonburg Co. or its assignees ever to construct its road southerly beyond the Southern

R. R. so as to connect with the Erie & Kalamazoo R. R. Sess. Laws 1846, p. 288. This legislation on the part of the State was in the interest of its own enterprise, in building the Michigan Southern from Monroe to New Buffalo, by preventing the traffic which would pass over the Jacksonburg road from going to Toledo over the Erie & Kalamazoo road.

In 1840 the Michigan Southern R. R. Co. was incorporated, and the State sold to this corporation the Michigan Southern R. R., and it undertook the completion of the project which had been commenced by the State as part of her scheme of internal improvements. By the act of incorporation, the Michigan Southern R. R. Co. were bound to build the Tecumseh branch from the village of Tecumseh by way of the village of Clinton, and of Manchester to the village of Jackson, along the line formerly authorized to be constructed by the Jacksonburg & Palmyra R. R. Co. The road from Tecumseh to Manchester was completed in 1855, and from there to Jackson in 1857. In 1856 the Michigan Southern & Northern Indiana R. R. Co., which was the successor of the Michigan Southern R. R. Co., constructed a road from a junction with the track of the Erie & Kalamazoo Co. about 5000 feet east from the station at Palmyra village to a connection with the road of the Michigan Southern Co. at Lenawee Junction, so called; said Lenawee Junction, being the point at which the Jackson branch road of the Michigan Southern Co. connects with its main line of road between Adrian and Monroe. The main object of constructing this piece of road was to save the necessity of transporting passengers and freight coming from the direction of Toledo, destined over the Jackson branch or over the main line, towards Monroe, or coming from the Jackson branch or from Monroe, destined towards Toledo, around by the way of Adrian, thus saving a distance of about eight miles. Another object was to avoid the heavy grades and reverse curves which existed on the line of the Erie & Kalamazoo Co's. road between Palmyra and Adrian.

There are several affidavits filed by the attorney-general in support of his application, from which it appears that the Erie & Kalamazoo R. R. Co., as early as 1835 or 1836, constructed its road between Adrian and the village of Palmyra substantially upon the line at present occupied by it, and that a general freight and passenger station was then established, and has ever since, until recently, been maintained, at Palmyra village; that this village contains about two hundred and twenty-five inhabitants, three stores, three blacksmith shops, one wagon shop, three halls, a graded school-house, two churches, one steam saw-mill, and one paper-mill; that it is the only village in a township containing about 2000 inhabitants; that soon after the completion of the road between Lenawee Junction and the Erie & Kalamazoo road, east of Palmyra village, the company controlling and operating said

Erie & Kalamazoo R. R. commenced gradually to withdraw the business which had been previously carried on over the Erie & Kalamazoo road between Palmyra and Adrian, and to transfer it to the road to Lenawee Junction; but they still maintained depot facilities at Palmyra station, and afforded the people all the usual accommodations at such station until 1867, when, from that date to 1873, the railroad facilities at Palmyra station were still further diminished, and from 1873 the Lake Shore and Michigan Southern R. R. Co. (who succeeded the Michigan Southern and Northern Indiana in 1869) has ceased and refused to deliver at said village freight in quantities less than car-loads; and since December 1, 1882, they have ceased to maintain any depot or station at Palmyra village, and have ceased to run freight and passenger trains over that portion of the Erie & Kalamazoo R. R. lying between the cut-off about a mile east of Palmyra village, and the point of junction of the Erie & Kalamazoo R. R. with the Michigan Southern R. R. near the city of Adrian, being a piece of road five and seventy one-hundredths miles in length; that instead of using said piece of road for the transportation of freight and passengers, it is used as a place for the storage of cars, some of which are stock cars, which are left in a filthy condition near to the residences of farmers, and constitute, by reason of the stench arising therefrom, a nuisance; that they have suffered this portion of the road to become out of repair and unfit for use in transporting passengers and freight; that a bridge has become so dilapidated that it is unsafe for engines or cars to pass over the same, and that none have passed over the same since December, 1882; that since that date no freight has been brought into the village, except from eastward, and in car-loads; and that the company has continually refused to receive or deliver freight in quantities less than car-loads, except as a special concession in favor of a paper-mill firm; that in 1877 they sold all the station buildings, water-tanks, sheds, platforms, and appurtenances previously in use by the company in the village, and the same have been removed; that in 1881 they took up and removed all the side-tracks, except about seven rods. These several acts are alleged to be a great public wrong, and to have a blighting effect upon the village, transforming this modern Palmyra, like the ancient, into a Tadmor in the desert.

Affidavits have been filed and arguments made in opposition to this application, not denying that the station at Palmyra village has been practically discontinued, and the portion of the track above described wholly abandoned for the purpose of running and operating freight and passenger cars over the same, but excusing such non-user on economical grounds. Whether such a justification can be made to appear as will excuse the Erie & Kalamazoo R. R. Co. from performing its charter obligations I do not think it proper to pass upon at this stage of the case. Upon general

principles of law, the Erie & Kalamazoo R. R. Co. were bound to construct their road between the termini named in their charter; and, having so constructed it, to run and operate the whole and every material part thereof until relieved therefrom by the legislature. Whether there are exceptions to this general principle, and whether the company may be able to bring itself within such exceptions, I shall not attempt here to decide. The question does not appear to me to be presented in such shape as to call for an expression of opinion upon it.

So far as the affidavits produced in support of the application set out the grievances of the residents of Palmyra in relation to being deprived of railroad facilities at Palmyra station, although of vital consequence to them, they do not appear to me to affect the general public. If to the greatest number of the patrons of the road increased facilities are afforded, time is saved, and expense of transportation lessened, it would seem that the greater number interested would be benefited by the management as complained of. Admitting all that is alleged against the management, yet I fail to discover how a writ of quo warranto will afford redress to the citizens of Palmyra. If the charter should be declared forfeited, it will not restore the railroad or afford shipping facilities in place of those now withdrawn. It may cause the right of way to revert to the owners and abate the nuisance complained of; but it will not give them a railroad station at Palmyra. It seems to me that those interested in having the Erie & Kalamazoo R. R. Co. perform its duties to the citizens of Palmyra have mistaken their remedy. Their remedy lies, not in a forfeiture of the charter, but in compelling obedience to its requirements. I therefore lay out of view those portions of the affidavits showing personal or private grievances. The affidavits do show a violation of charter obligations in relation to the abandonment of a portion of the road. The attorney-general has thought such violation to be of sufficient importance to the public to call upon the company to show why its charter should not be forfeited, and he applies to us for leave to file an information in the nature of a quo warranto. It is obviously the intention of the statute that corporations shall fulfill the conditions and perform the duties enjoined upon them by their charters as the terms upon which they are permitted to enjoy their franchises.

No doubt that the requirement that the attorney-general shall first obtain leave of the court to file the information implies that the court shall exercise a legal discretion in passing upon his request. Cases might, by possibility, arise, where a technical breach of the charter condition would, in case of forfeiture, be followed by results disastrous to the best interests of the people. In this instance the railroad company complained of is a quasi-public corporation. It subserves great public interests. It may safely be

said that the State has outgrown that narrow policy which sought to compel all great lines of transportation from the west to the seaboard to pass through ports or points exclusively within her own borders. The people of this State are deeply interested and affected by every facility afforded to the great producing and manufacturing interests in finding ample facilities for transportation to the markets of the world. The Erie & Kalamazoo road forms the main line of the Lake Shore & Michigan Southern R. R. to Toledo and the east. Into this main line a number of branch roads leading from the interior of the peninsula are connected.

The effect of a forfeiture of the Erie & Kalamazoo division upon a large section of the State would, for a time, be serious. Assuming, therefore, that here is a violation of the charter of the Erie & Kalamazoo R. R. Co., which, in the strict letter of the law, would call for a judgment of forfeiture, is it for the best interests of the people of the State, who are represented by the attorney-general, that such charter should be forfeited? Would we be exercising a sound legal discretion to permit the information, under the circumstances, to be filed? No one can be foolish enough to suppose that the link would not be restored by a new road, at whatever cost. What interest of public policy, or even individual welfare, requires such unnecessary work, and useless outlay of capital? Shall it be done simply as a penalty inflicted upon the Erie & Kalamazoo R. R. Co. or its lessees? I agree with my brother Campbell that the penalty is too great in proportion to the offence alleged. Still, it must be remembered that the court is possessed of no dispensing power. If the papers before us show to our satisfaction that the Erie & Kalamazoo R. R. Co. has wilfully violated its charter in matters relating to the essence of the corporate grant, thereby affecting the contract between the State and corporation, our duty is plain. No matter what the consequences may be in such case, the leave asked should be granted. It is therefore proper to consider, assuming that the fact that since 1882 the Erie & Kalamazoo R. R. Co. have neglected to run cars for the transportation of freight and passengers over that portion of its road between Palmyra village and Adrian is a violation of its charter in a material point, whether such violation has been wilful, since it must be not only an intentional but wilful violation of its charter which will render the violation amenable to this process for the purpose of depriving it of its charter rights. In determining this question, the entire history of the road, as well as those with which it has been connected and by which it has been managed, is proper to be considered. Railroad facilities for the people of the township of Palmyra have not been lessened, except at Palmyra station, while others have been established in close proximity. A glance at the map introduced by the respondent

will show relatively the respective localities and distances. A through line of railroad from Toledo to Adrian has been maintained and operated. It is certainly questionable whether the discontinuance of a station upon a line of road, at a place not named in its charter as a point through which it must pass, will constitute a ground of forfeiture of the charter, and I do not express any opinion upon it; and, aside from this act, the change of route by the lessees of respondent, and the management and operation of the railroad leased by them, do not indicate a design to wilfully violate the charter of the Erie & Kalamazoo R. R. Co. It is true, the people of Palmyra, by repeated petitions, besought both the Erie & Kalamazoo R. R. Co. and its lessees to do them justice by continuing a general station at the village; but the question of the right to the station is not so clearly of the essence of the contract between the State and the company, and undisputed, as to fasten upon the company the design to wilfully violate the contract in the discontinuance thereof.

I am not satisfied, from all the facts before us, that the failure of the Erie & Kalamazoo R. R. Co. to run and operate its road the whole distance from Toledo to Adrian has been wilful. It evidently left its management and mode of operation entirely to its lessees; and while it has been ingrafted into the system of railroads operated by its lessees, it has not become an integral part thereof, and its franchises and privileges are independent of such lessees, and must be preserved by its own action, and it must be held responsible for the performance of those duties devolving upon it by the legislative grant; and, now that its attention has been specially drawn to this obvious breach of duty, by the attorney-general, should it persist in the course it has pursued for the past two years (unless relieved from the performance thereof by the legislature), I shall feel it my duty upon a future application, speaking for myself, to grant leave to file an information, in which case the whole range of inquiry will be open to investigation on behalf of the State.

For the reason stated I think the present application should be denied.

CAMPBELL, J.—The principal difficulty in this case seems to me to be concerning the discretion of the court in giving judgment, if proceedings are once allowed. Under the common-law practice as existing before our statute of 1846 was passed, it was held by this court that there was considerable discretionary power on this subject, inasmuch as the attorney-general was not required to apply for leave to file the information. *People v. Oakland County Bank*, 1 Doug. 282. And in that case a nominal fine only was imposed, with an intimation that a repetition of the offence would lead to a judgment of forfeiture. This same view seems to have prevailed

in New York, when the doctrine on these matters was very thoroughly discussed in *People v. Kingston & Middletown Turnpike Co.*, 23 Wend. 139; *People v. Bristol & Rensselaerville Turnpike Co.*, Id. 222; *People v. Hillsdale & Chatham Turnpike Co.*, Id. 254.

The records of this court show that in 1845 an information was filed against respondent for violation of charter, to which objections were made for want of authority to proceed in that way. The jurisdiction was sustained, but the attorney-general, in his annual report in January, 1846, called the attention of the legislature to the importance of some statutory action on the subject, and at that session such provisions were included in the projected revision, which came into effect in March, 1847, and is the statute under which this application is made. But that same legislature, by special statute, which remitted the forfeiture of this charter, imposed some new conditions, among which were a specific tax, the rescission of the right to build north of Adrian, the repeal of section 19, which allowed other railroads to connect with it, and the subjection of the charter to alteration, amendment, and repeal. Laws 1846, pp. 288–290. The acceptance of this amendatory act appears in the Statutes of 1847, p. 218.

The statute now in force on the subject of quo warranto requires leave before such an information is filed, and makes the granting here, as in England, discretionary. But it gives no range of discretion between fine and forfeiture. Comp. Laws, § 7096; How. § 8657. It is possible that this still leaves the court power to fine as for a misdemeanor. But the limit of such fines is now very small (Comp. Laws, § 7678), and would not be adequate for any serious offence. At the same time it is quite evident that circumstances may make an entire forfeiture of charter a punishment which would be beyond the occasion, as affecting injuriously, not only the corporation, but also the interests of other persons. The act of 1846 having given the legislature such full power for the redress of wrongs under the charter, I think that the facts shown in answer to the motion are such as make it proper for us to deny the present motion, inasmuch as such denial will not bar a future prosecution, in case such should be the pleasure of the legislature. I am partly influenced in this view by the fact that a considerable part of this road is now beyond the limits of Michigan, so that no corporation hereafter created could, under any authority from this State, cover the same line. The course of legislation concerning the part of the road now involved in this dispute indicates that this consideration has not been overlooked by the legislature itself.

If I were satisfied that we had power, on conviction, to give any other judgment than forfeiture, I should feel bound to give my opinion in favor of allowing the information to be filed. It is

altogether likely that the action had by the persons in control has been under belief of its validity, and that question cannot be precluded by any preliminary action. But the showing so far made is not quite satisfactory on that point, and the legislation in regard to the lines of road about Palmyra seems inconsistent with it. The Erie & Kalamazoo R. R. Co. has never had, as such, the right to build any road except between Port Lawrence (now Toledo) and Adrian. That road was expressly required to be laid out and built within a limited time, and it was laid out and built so as to pass through the village of Palmyra, and to the northwest of it. No change in this line has ever been sanctioned by the legislature, and the road which now leaves this road and passes northeastward, so as to connect at the Southern R. R. with the line running north over the old line of the Palmyra & Jacksonburg R. R., was not and could not have been built by respondent.

Reference has already been made to the repeal of section 19, which provided for connections with other roads. This repeal is in the direct line of a policy which was distinctly recognized, in opposition to furnishing outlets from Michigan by rail to ports in other States. How far this has been changed is a question not now important. That legislation is very significant as bearing on the present controversy. When respondent was chartered, Port Lawrence or Toledo was a Michigan port, in the possession of the territory, and under its full control. The State of Michigan insisted on its legal rights to this territory for a considerable time after its organization. But after it became practically settled that Toledo was outside of our boundaries, the future legislation ceased to favor any further connections with this road as an outlet. While this claim of territory was undecided, a charter was granted to the Palmyra & Jacksonburg R. R., which was to run from Palmyra to Jackson. The charter does not say whether the village or the township should be the terminus, but it evidently contemplated that the road should not stop at the town line, and subsequent legislation shows that the village was intended, as in 1840 the legislature provided for lending that company enough rails to iron the track from Palmyra village to Clinton. Laws 1840, p. 172.

This road had previously been aided by the State by a loan of bonds. In 1841, when the interest was in arrears, the auditor-general was authorized to release the securities given by the company, but only on condition that it should release to the State so much of its road "as lies between the Southern R. R. and the Erie & Kalamazoo R. R." And it was in the same act expressly provided that thenceforward it should not be lawful for said company or its assigns ever to construct the Palmyra & Jacksonburg R. R. southerly beyond the Southern R. R., so as to connect with the Erie & Kalamazoo R. R. Laws 1841, p. 140.

The road north from the Southern R. R. it was required to complete to Clinton on the same gauge as the Southern road. When the Southern road was sold in 1846 the State had become owner of this line north of the Southern R. R., and included it in the sale. Not only did the State give the Southern road no right to make southern connections leading out of the State, but it absolutely prohibited it west of Monroe County. Laws 1846, p. 176.

The Erie & Kalamazoo R. R. being the only southern outlet then permitted, and the junction between that and the Palmyra & Jacksonburg road having been forbidden, there is no doubt what this meant. It was designed to prevent any diversion from the Southern road and its Monroe terminus, except so far as it was provided for by the Erie & Kalamazoo road as located between Toledo and Adrian.

It is therefore no legal excuse for the grievance now complained of, in discontinuing the use of the track through Palmyra to Adrian, that the track east of Palmyra and substantially in the direction of the Palmyra & Jacksonburg line, which was distinctly prohibited, furnished for the general public an adequate outlet.

The Erie & Kalamazoo R. R. charter, whether the road is managed by its own directors or by lessees, can furnish no authority to any one to deviate from the charter conditions. The question of preference between the Palmyra interests and those of other persons is not one which we can settle. The legislature, when it granted special charters and fixed the lines or termini, did so on grounds satisfactory to itself, which no court can review. A charter franchise must always be subject to the charter conditions, whether profitable or not. The privileges cannot be used and the burdens rejected. I think the respondent is legally bound to confine its business to the line located under the charter, and not to discontinue it on any part of that line. Whether the company to which it has been leased can, in its separate capacity, lawfully divert business over the cut-off, is a question which respondent cannot present to us, and which we cannot on this record consider. But under the legislation already referred to it seems clear that respondent can make no arrangement for such a connection to the prejudice of its only line as recognized by law.

For these reasons I concur in denying the motion only on the ground that, under all the circumstances and until action by the legislature, I think a complete forfeiture would be a severer punishment than ought to be inflicted, unless respondent should fail to redress the grievance.

COOLEY, C. J.—I agree in the conclusions reached by my brother Champlin. In the view I take of the facts there has been

no forfeiture on the part of the defendant; but, as the result is agreed in, I do not deem it important to discuss facts.

SHERWOOD, J.—I agree with Judge Champlin that “upon general principles of law the Erie & Kalamazoo R. R. Co. were bound to construct their road between the termini named in their charter, and, having so constructed it, to run and operate the whole and every material part thereof until released therefrom by the legislature.” And, further, that railroad facilities are of vital consequence to the people of Palmyra and vicinity, as shown by the affidavits of the applicants. These people are a part of the general public, and there are more than a few individual interests involved. They are a community with a village located on the line of this railroad, with interests requiring this road, and a depot and freight facilities, and the regular daily running of cars over the road. The interests of this community, like that of all others along the line, was that intended to be secured and subserved by the legislature in granting the charter. These interests, as the papers show, have not only been neglected, but more than abandoned by the company. It has not only ceased to run its trains over the portion of the road complained of, but uses the track and right of way as storage ground for empty cars, and all the nuisances usually accumulating in cars used for transporting stock, until the stench from the locality has become both offensive and a nuisance; and these things have not only been permitted, but persisted in for a long time against the remonstrance of the community injured. It has also abandoned its depot and station buildings, and suffered its track to go into dilapidation and decay to the extent of rendering it unfit for the ordinary uses of the road in transacting the carrying trade of the Palmyra community. It seems to me very clear that such conduct and such management, whether by owners or lessees, must be held to be contrary to the privilege of the company, and in violation of its charter duties.

The complaints made, if they are well founded (and in considering the question upon this motion, whether they are or not, we should look most favorably upon the showing made by the applicants), indicate a disregard of the corporate duties of the company, whether wilful or not, which would well warrant a forfeiture of their corporate franchise. Such acts and such neglects as are shown in the affidavits in support of this motion—admitted to be against the interest and convenience of the Palmyra community—cannot be excused by claiming them to be in the interest of the general public. General public is not a very clear or well-defined term. It may mean more or less, varying with the peculiar notions and views of the party using it. While the managers of this road might consider those interested in the traffic of the entire line, including its leased lines, it is very evident such was

not the general public whose interests were to be subserved when the legislature granted the franchise, nor the general public whose interests were to be respected by the defendant, regardless of the several communities along the line of the Erie & Kalamazoo R. R. And if the business of the existing corporation now using and managing the road requires greater accommodations, and other lines of road running in close proximity to this, the chartered obligations to continue the regular business of this road are thereby rendered no less imperative until the company is properly relieved therefrom. Neither do I think that the fact that the discontinuance of the advantages of railroad facilities to this Palmyra community would be of increased advantage to the greater number of patrons of the road, any excuse for so doing. All of its patrons are entitled to equal privileges along the line of its road, and they cannot be legally deprived of them by the defendant.

Of course, a reasonable discretion may be used by the company in extending or furnishing to any community facilities for the transportation of passengers and freight, and in determining the points at which stations shall be established along the line of the road for receiving the same; but that discretion cannot be used to the extent of denying the facilities wholly to any community, and that seems to have been done in this case. Palmyra was a point, at the time the charter was granted, of sufficient importance to require these privileges, and there is no showing that it has grown less so, however it may be regarded by the defendant.

I quite agree with my brother Champlin that this railroad is a quasi-public corporation, and subserves great public interests. But it was intended to subserve the interests of private individuals and communities as well, and under its charter cannot disregard the one any more than the other; and while a technical violation of its charter in either case, if not wilful, will not be considered, my brother Campbell, in his opinion in this case, shows conclusively that when the Southern R. R. was sold in 1846, the State had become owner of the line of railroad known as the Palmyra & Jacksonburg R. R., which was north of the Southern R. R., and included it in the sale. Not only did the State give the Southern road no right to make connections leading out of the State, but prohibited it west of Monroe county. And I quite agree with him in his conclusions that "the Erie & Kalamazoo R. R. being the only southern outlet then permitted, and the junction between that and the Palmyra & Jacksonburg road having been forbidden there is no doubt what this meant. It was designed to prevent any diversion from the Southern road on the Monroe terminus, except so far as it was provided for by the Erie & Kalamazoo road, as between Toledo and Adrian." That "it is therefore no legal excuse for the grievance now complained of in discontinuing the use of the track through Palmyra to Adrian, that the track east of

Palmyra and substantially in the direction of the Palmyra & Jacksonburg line, which was distinctly prohibited, furnishes for the general public an adequate outlet." That "the Erie & Kalamazoo R. R. charter, whether the road is managed by its own directors or by lessees, can furnish no authority to any one to deviate from the charter conditions. The question of preference between the Palmyra interests and those of other persons is not one which we can settle. The legislature, when it granted special charters and fixed the line of termini, did so on grounds satisfactory to itself, which no court can review." That "a charter franchise must always be subject to the charter conditions, whether profitable or not. The privileges cannot be used and the burdens rejected. I think the respondent is legally bound to confine its business to the line located under the charter, and not to discontinue it on any part of that line. Whether the company to which it has been leased can, in its separate capacity, lawfully divert business over the cut-off is a question which respondent cannot present to us, and which we cannot on this record consider." And that, under the legislation as it now stands, the "respondent can make no arrangement for such a connection to the prejudice of its only line, as recognized by law."

This is an application for leave to file an information in the nature of a writ of quo warranto, and I do not think it proper now to discuss the consequences of a forfeiture to the defendant. While they may be considered upon the return of the writ in the final adjudication, I do not think even then they should control, when the facts show a clear case of forfeiture; neither do I think a forfeiture should be regarded in the nature of a punishment or penalty. The franchises granted are in the nature of a contract with the company, by the terms of which the company agrees to furnish to individuals and the public the transportation facilities (for a reasonable consideration) mentioned in the charter, and on failing to do so, surrender up the franchise; and the judgment of the court in the matter can do no more than determine the fact of failure, and declare the forfeiture; at least, it is doubtful whether it can do more under the law as it now stands. I do not mean to say that damages or a penalty may not be awarded under the law for gross neglects or wilful misconduct in the performance of its duty or use of its franchises, on the part of the company, not amounting to a forfeiture. It is unnecessary to discuss that question now, as, in my judgment, a different case is presented by the attorney-general; neither do I agree in the suggestion that the remedy of the Palmyra community "does not lie in proceedings for forfeiture of the charter, but in compelling obedience to its requirements." It is true, obedience to the requirements of the charter is the object most desired; but if this cannot be compelled, then a surrender of the franchise becomes necessary, that it may

be conferred upon another. And it is quite possible, where the right to forfeiture is contested as in this case, the negligent company may be induced to resume the proper discharge of its duties rather than subject itself to the consequences of forfeiture. Certainly, if there is any other remedy by which the company can be compelled to observe the requirements of its charter, I have not heard it suggested. I think the leave asked by the attorney-general should be granted.

TERHUNE

v.

MIDLAND R. R. Co. OF NEW JERSEY et al.

(38 *New Jersey Equity Reports*, 423.)

Where several railroad corporations have by authority of law been consolidated, this court has no jurisdiction, upon the application of a bondholder and stockholder of one of the original corporations, to put an end to the existence of the consolidated company, upon the alleged ground that it had its origin in a fraudulent design, and was created to answer a fraudulent purpose, nor upon the ground that the proceedings for consolidation had been defective.

The bill also seeks relief against a construction company, to which, complainant alleges, certain shares of stock and certain bonds of the original company were fraudulently transferred by the directors of the original company, and asks that the stock and bonds be surrendered. *Held*, that the directors of the construction company were proper parties, with a view to a discovery.

Several defendants, who could not have been compelled to join in one demurrer, demurred separately, but all appeared by the same solicitor and counsel. *Held*, that only one bill of cost should be allowed them, but that that might embrace the costs of drawing, engrossing, and filing all of the demurrers, and drawing, taking, and filing the affidavits thereto.

ORIGINAL and supplemental bills for relief. On general demurrer to amended supplemental bill.

J. W. Taylor for demurrants.

J. A. McCreery for complainant.

CHANCELLOR RUNYON.—The object of the complainant in bringing this suit is to protect his interest as a bondholder and stockholder of the Midland R. R. Co. of New Jersey. Since he filed his original bill that corporation has, with others, been consolidated into a new corporation, called the New York, Susquehanna & Western R. R. Co. By that bill he sought to protect his interest against the action of the Midland Co., and the persons who constituted a committee of reorganization of the Midland Ry. Co. of New Jersey, of which the Midland R. R. Co. of New Jersey

is the successor, in issuing stock and bonds of the latter company in excess of the amounts limited by the agreement of reorganization. By his supplemental bill he seeks to protect that interest against the acts of the consolidation before referred to, in the issuing of bonds and stock, and against the acts of the directors of the Midland R. R. Co. in effecting the consolidation and in the fraudulent issue of stock of the Midland R. R. Co. to a construction company (the New York & Scranton Construction Co.), in which they were interested. After the consolidation had taken place, the resultant corporation, the New York, Susquehanna & Western R. R. Co., made a mortgage for \$5,500,000 upon its property to the Central Trust Co. of New York, to secure the payment of its bonds. The complainant, by his supplemental bill, did not make the trust company a party. He made the various companies which were consolidated, and their directors and stockholders, and the New York, Susquehanna & Western R. R. Co. and the construction company and their directors, parties. The apparent and avowed object of the supplemental bill is to dissolve, by decree of this court, the New York, Susquehanna & Western R. R. Co., and to obtain a decree that the construction company surrender the stock and bonds issued to it; and generally to undo all that has been done in the premises, whether before or after the consolidation, prejudicial to the interest of the complainant as a bondholder and stockholder of the Midland R. R. Co. That company and others of the defendants demurred to the supplemental bill on the ground of want of parties (the non-joinder of the trust company), and want of equity. The complainant submitted to the demurrer so far as the former ground was concerned, and amended his bill accordingly. The question submitted on the argument of the demurrer was whether there is equity in the bill, and if so, whether the natural persons who have demurred, ought to have been made parties to it.

The complainant, by the supplemental bill, alleges that the defendants, the directors of the Midland R. R. Co., have fraudulently conspired with the defendants, who are directors and stockholders of the other corporations, which with it were consolidated into the New York, Susquehanna & Western R. R. Co., to defraud the complainant by means of the creation of those corporations and that consolidation and the corporate acts of the latter. It is not within the jurisdiction of this court to put an end by its decree to the existence of the consolidated company for the causes alleged in the bill. That corporation exists by authority of law, and this court therefore has no power to put an end to it on the ground that it had its origin in a fraudulent design and was created to answer a fraudulent purpose. *Atty.-Gen. v. Stevens*, Sax. 369; *National Docks Ry. Co. v. Central R. R. Co.*, 5 Stew. Eq. 755. The complainant, therefore, cannot obtain the relief he seeks on that head.

It is alleged in the bill, it may be remarked, that the proceedings for consolidation are defective, and therefore it is urged that the consolidation was not in fact legally effected. But whether it was legally effected or not is not a question to be decided here. The company is a *de facto* corporation existing under the forms of law. The directors of a corporation may sometimes, indeed, be made parties for discovery merely in a suit for relief against the company; but here no relief can be granted as against those corporations. If it be conceded that those persons conspired with the directors of the Midland Co. to create corporations and consolidate them and that company together, in order to get the property of the latter, that is no reason for making them parties; for this court cannot on that ground dissolve the corporation created by the proceedings for consolidation. Any relief which this court may grant against it must, it would seem, be of a prohibitory or preventive character merely. As to the construction company, it is alleged not only that it was created and organized by the directors of the Midland company to defraud the complainant and other stockholders and bondholders of the latter company, but that it received certain shares of stock and certain bonds of that company which were fraudulently transferred to it by the Midland company, and which the complainant insists it ought to surrender. The bill seeks relief against the construction company, and therefore its directors are proper parties with a view to a discovery.

Those persons who are made parties as directors or stockholders of the corporations other than the Midland company, which were consolidated, are neither necessary nor proper parties, nor are the corporations themselves. Their demurrers, therefore, must be allowed, with costs. As to the other demurrers, the complainant must pay costs thereon up to the time of amendment. Those demurrers would have been sustained on the ground of want of necessary parties, had the complainant not submitted to them so far as that ground was concerned.

The complainant insists that he ought not to be compelled to pay costs on more than one of the demurrers which went to argument. This is on the ground that the filing of more than one should be considered unnecessary and oppressive. The demurrants all appeared by the same solicitor and counsel. In some of the demurrers, it should in fairness be stated, many defendants join; in two instances as many as ten. The questions brought up for decision might indeed all have been presented under one demurrer had the demurrants seen fit to join in one; but they could not be compelled to do so. Under the circumstances it will be proper to allow, as to those demurrers, only one bill of costs, which will be as upon one demurrer only, except that it may include the costs of drawing, engrossing, and filing all of them, and drawing, taking, and filing the affidavits thereto.

EDWARDS

v.

WILLIAMSON.

(71 *Alabama Reports*, 145.)

The principle is fully recognized by this court, that in pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government, the presumption will be indulged that such legislative act is constitutional, unless the court is clearly convinced to the contrary.

The provision contained in the constitution of the United States, which prohibits the passage of any State law "impairing the obligation of contracts;" and the similar provision in the State constitution, prohibiting the passage of any law "impairing the obligation of contracts by destroying or impairing the remedy for their enforcement," were intended to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion.

The obligation of a contract has been defined to be, "its binding force on the party making it," or "the law which binds the parties to perform their agreement;" and it has been declared by the Supreme Court of the United States, that this depends upon the laws in existence when it is made, which are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform by the one party, and the right acquired by the other.

Laws affecting merely the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of existing contracts; and it is held not to impair, when it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made; and while it may not be necessary that the new or substituted remedy should be as prompt or convenient as the old one, "it is very certain that it must be fully adequate to the enforcement of the contract."

The constitutional prohibition has no reference to the degree of impairment, but alike forbids the least and the greatest; and any subsequent law, which so affects the remedy existing at the time the contract was made, "as substantially to impair and lessen the value of the contract," is within the provision.

Under the provisions of the act approved December 31st, 1868, by which counties, cities, and towns were authorized, on a popular vote, to subscribe to the capital stock of any railroad deemed by them most conducive to their respective interests; when such subscription was made, and the bonds of the county, city, or town, issued in pursuance of it, the holders of such bonds were, by the terms of the statute, placed on a perfect equality with the State and county, in the assessment and collection of the necessary and proper taxes; the same duties were imposed upon all officers, State and county, concerned in the assessment and collection of such taxes, and the same remedies given against them for any neglect or breach of duty. Under the provisions of the act approved March 1st, 1876, and the amendatory act approved January 22d, 1877 (now forming sections 404-407 of the Code), tax-collectors are authorized to give separate bonds for the collection of the

general State and county taxes, and for the collection of any special tax "authorized by law, or required by the judgment of any court," one or both; and when a collector gives a bond conditioned for the collection of the general taxes only, the governor is authorized to appoint a collector for the special taxes, who must be a citizen of the county, and must give a bond with such citizens as his sureties. *Held*, that the effect of these provisions, where a county had subscribed to a railroad under the law of 1868, and judgment has been obtained against it by a holder of its bonds, as in this case appears, is to permit the collection of taxes for general State and county purposes, as under former laws, while another remedy, less prompt and effective, is provided for the collection of the special railroad tax; and hence these sections, in their application to a county which had become liable on its subscription to a railroad prior to their adoption, are unconstitutional, and the tax-collector cannot claim the right to give a bond conditioned for the collection of the general taxes only.

APPEAL from the Circuit Court of Lee.

Geo. P. Harrison for the appellant.

Wm. H. Barnes & Son and Watts & Sons for the appellee.

SOMERVILLE, J.—This is a petition for the writ of mandamus, by J. H. Williamson, as tax-collector of Lee county, against the appellant, J. K. Edwards, as the probate judge of the same county, to compel an approval of petitioner's bond as tax-collector. The refusal of the respondent to approve the bond was placed alone on the fact, that he did not deem the form of the condition as being proper and legal, under the peculiar facts of the case. There is no question raised in reference to the solvency of the sureties, or the sufficiency of the instrument in other respects. It was admitted to be executed in accordance with the provisions of sections 403-405 of the Code of 1876. But it was urged that these sections, embodying the act of March 4th, 1876 (Acts 1876, p. 93), are unconstitutional and void, as applicable to contracts made under the act of the General Assembly of December 31st, 1868, commonly known as the "Railroad Aid Law," to which particular reference will hereafter be made.—Acts 1868, p. 514. A peremptory writ was issued on the hearing by the Circuit Court, ordering the approval; and an appeal is taken from the judgment, to this court.

The question raised by the record is, whether these sections of the Code (§§ 404-407) can be made applicable to taxes authorized to be assessed and collected under the provisions of the act of December 31, 1868, without impairing the obligation of contracts entered into on the faith of, and under the terms of the latter act. Are they, in other words, so far as concerns the contracts in question, repugnant to either the Federal or the State Constitution?

The enactment of December 31, 1868, is entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests." It provides, in detail, for the legal ascertain-

ment of the voice of the majority of qualified voters, and upon the announcement of the vote following the proposition of a subscription, the court of County Commissioners are authorized and required to make the subscription voted for in behalf of any county, payable in the bonds of such county, of certain amounts and dates specified.

Sections 7, 8, and 9 of said act, thereupon, provide as follows:

“SEC. 7. Be it further enacted, That the court of County Commissioners of said counties, in which the electors shall have voted in favor of said subscription, are hereby authorized and required to levy and assess, in the same manner as is now required by law for the collection of State and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax, and for issuing said bond; Provided, that in no case shall such tax exceed one per cent per annum upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers.”

“SEC. 8. Be it further enacted, That the courts of County Commissioners, in the various counties, in which such subscription shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax. Then said courts of County Commissioners shall be, and they are hereby, invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against such tax assessors and collectors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected and paid over, or misapplied.

“SEC. 9. Be it further enacted, That the tax assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby vested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of State and county taxes, and be bound by the same duties; and that the same pains and penalties as are now prescribed by law, shall attach to all persons for failing to render a tax-list, or for rendering a false list.”

At this time, the statute required but one bond to be executed by every tax-collector, which obligated him to collect both general and special taxes. Code of 1876, § 403; Code of 1867, §§ 494–496.

On March 4, 1876, the General Assembly passed an act, entitled “An act to allow tax-collectors to give separate bonds for the collection of the ordinary State and county taxes, and all other taxes for special purposes” (Acts 1875–76, p. 93); and the third sec-

tion of the latter act was amended January 22, 1877 (Acts 1876-7, p. 19), so as to read, in substance, as stated in section 406 of the present Code. The two acts together, original and amendatory, are now incorporated in the Code, so as to constitute sections 404 to 407, inclusive.

The full force and bearing of these sections cannot be thoroughly comprehended without setting them out in *ipsisssimis verbis*. They read as follows:

“§ 404. Separate bonds may be given for general and special taxes. Whenever any county of this State shall be authorized by law, or required by the judgment of any court, to levy any tax for any special purpose, other than the taxes authorized by the general revenue laws of the State, the tax-collector shall be authorized to give separate bonds for the collection of the taxes authorized by the general revenue laws of the State, and those authorized by law, or required by the judgment of any court, to be levied by counties for special purposes.

“§ 405. Contents, execution, and approval of general and special bonds. The bond for the collection of the taxes under the general revenue laws of the State, which includes all State taxes, and the taxes levied by the counties for the purpose of defraying the current expenses of the county, shall be made and approved in all respects as provided by section 403, and shall be conditioned faithfully to discharge the duties of tax-collector in the collection of such taxes. The bond for the collection of special taxes, authorized by law, or required by the judgment of any court to be levied by counties, shall be in double the supposed amount of such taxes, and shall be taken and approved in all respects as the bonds of tax-collectors, and shall be conditioned to perform all the duties of tax-collector in the collection of such special taxes.

“§ 406. On failure to execute either bond, collector collects taxes covered by other; judge of probate notifies governor, who appoints; appointee's bond and sureties. In the event that a tax-collector now in office, or one hereafter elected or appointed, shall make and execute one of the bonds, and shall fail or refuse to make the other, he shall go forward and collect the taxes for the collection of which he has given bonds; and it shall then be the duty of the judge of probate of the county to notify the governor of the failure to give such other bond; and the governor shall then appoint a special tax-collector for the collection of the taxes for which the regular tax-collector has failed to give bond; and such special tax-collector, after having given bond and qualified as herein provided, shall proceed to collect the taxes for which he shall have been so appointed, under the same regulations and under the same penalties as if he was the regular tax-collector; but such special tax-collector, so appointed by the governor, shall be a citizen of the county, and must give as security of [on] his bond some

citizen or citizens in the county for which he is appointed to collect the tax."

The official bond offered for approval in this case was conditioned "to faithfully discharge the duties of tax-collector of (said) Lee county, in the collection of all State taxes, and the taxes levied by the Commissioners Court of said county for the purpose of defraying the current expenses of said county during his term of office," etc. It was insisted by the respondent, that the condition of the collector's bond should be "to perform all the duties of his office which are or may be required by law," so as to include the duty of collecting certain special taxes which the Commissioners Court of Lee county had been ordered to collect, or have collected, in obedience to a peremptory writ of mandamus issuing from the circuit court of the United States. This mandamus was based on a judgment in favor of one John B. Manning, against the county of Lee, for over the sum of \$19,000, which had been rendered in a suit on certain bonds of the county, issued under the provisions of the act of December 31, 1868, commonly known as the "Railroad Aid Law."

We are not unmindful of the gravity of the question which we are called on to decide in this case, nor of the delicacy of the duty devolved upon us. The principle is fully recognized, that in pronouncing on the constitutionality of an act which has received the sanction of a co-ordinate department of the government, this court will indulge the presumption that such legislative act is constitutional, unless "clearly convinced to the contrary." *Morris v. S. & N. R. R. Co.*, 65 Ala. 193; *Zeigler v. Same*, 58 Ala. 594; *Sadler v. Langham*, 36 Ala. 311.

The constitution of the United States prohibits the several States from passing any law impairing the obligation of contracts." U. S. Const. Art. 1, section 10.

The several constitutions of this State contained provisions substantially in the same language, from 1819 up to 1875. The present constitution, which became operative on December 6, 1875, contains the following clause: "There can be no law of this State impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the General Assembly shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State." Const. 1875, Art. IV., § 56.

The plain purpose of these constitutional barriers, we think, was to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion.

The obligation of a contract has been defined to be "its binding

force on the party making it;" or, as observed by Washington, J., in *Ogden v. Saunders*, 12 Wheat. 259, it is "the law which binds the parties to perform their agreement." It was said by the Supreme Court of the United States, in *McCracken v. Hayward*, 2 How. 612, that "this depends upon the laws in existence when it is made; [and that] these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other." The principle is announced, probably a little too strong, in *Van Hoffman v. City of Quincy*, 4 Wall. 535, 550, that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into, and form a part of it, as if they were expressly referred to, or incorporated in its terms." And it is said that this principle "embraces alike those which affect its validity, construction, discharge, and enforcement."

It has often been held, that whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it is held not to impair, provided "it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." Cooley on Const. Lim. 350, note 4, and cases cited; *Ex parte Pollard*, 40 Ala. 77. It may be that the new, or substituted remedy, is not required to be altogether so convenient, or prompt, as the old one; but it is very certain that it must be fully adequate to the enforcement of the contract. It is not permitted that the remedy may be so modified as to impair substantial rights, and no law is valid, under the above provisions of the constitution, State or Federal, which so operates on the remedy as not to leave existing creditors under a contract a substantial and adequate remedy, such as may have been guaranteed by the law in force at the time when the contract was made. Cooley on Const. Lim. 358-9, 351, 355; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Wolf v. New Orleans*, 103 U. S. 358; s. c., 12 Am. & Eng. R. R. Cas. 625; *McKinly v. Cardozo*, 8 S. C. 71; *Jones v. Crittenden*, 6 Am. Dec. 531; *Gunn v. Barry*, 15 Wall. 610.

In *Green v. Biddle*, 8 Wheat. 1, it was said, that if the act of the legislature so change the nature and extent of existing remedies as materially to impair "the rights and interests of the owner, they are just as much a violation of the contract, as if they overturned his rights and interests."

In *Louisiana v. New Orleans*, 102 U. S. 203, the obligation of a contract is held to be impaired by "such legislation as lessens the efficacy of the remedy" which the law in force at the time it was made provided for its enforcement.

In *Edwards v. Kearzey*, 96 U. S. 595, Mr. Justice Swayne, after an elaborate review of the past decisions of the United States

Supreme Court, announces the following principle as the correct one to be eliminated: "The remedy subsisting in a State, when and where a contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void."

It certainly is not going too far for us to say that the framers of our present constitution meant nothing less than this by the emphatic declaration made by them in section 56, article IV. of this instrument. A smaller measure of protection would be inadequate as against that possible abuse of State power designed to be guarded against; for nothing can be more material to the obligation than the means of enforcement. And, as asserted more than once, by that court which is the final arbiter of all questions which, like the one under consideration, are of a Federal character, "the prohibition [in the constitution] has no reference to the degree of impairment. The largest and the least are alike forbidden." *Planters' Bank v. Sharp*, 6 How. 327; *Von Hoffman v. City of Quincy*, 4 Wall. 535.

Applying these principles to the case before us, it is a noticeable and pregnant fact, that the act of December 31, 1868, places the holders of bonds issued under its provisions upon terms of perfect equality with the State, in the usual and sure method adopted for the collection of its own tribute. The court of county commissioners are "authorized and required to levy and assess, in the same manner as is now [i.e., was then] required by law for the collection of State and county taxes," such amount as was necessary to meet the interest falling due on said bonds, with certain incidental expenses, not to exceed the rate of one per cent per annum. The tax assessors and collectors of such counties are also "vested and empowered with all the rights and remedies for collecting said tax as are now [i.e., were then] provided by law for the collection of State and county taxes, and be [are] bound by the same duties." And the various Commissioners Courts, in the several counties voting subscriptions under the act, are "authorized and require to require the tax-assessors and tax-collectors to assess and collect said tax." Acts 1868, pp. 516-17, §§ 7-9.

The power of taxation is often said to be one vast in its character, and searching in its extent. It is the arterial life-blood of the State; for, without it, the corporate and political functions of every commonwealth would cease. The protection of the State is the consideration upon which taxes are demanded, and taxes are the equivalent paid the State for such protection. There is a cogent presumption that this equivalent will always be exerted, and by the enactment of vigorous laws to this end, if necessary. *Cooley on Tax*, 14-15. It cannot be supposed that the State

would permit so vital a power to be defied, or its execution to be defeated, by public sentiment, or popular prejudice, in any community within the domain of its jurisdiction, for the language of the constitution is mandatory, that "the governor shall take care that the laws be faithfully executed." Const., 1875, Art. 5, § 8. It is manifest that such equality of power, measured by the remedies existing at the time of the passage of this act, rendered more certain the prompt collection of the taxes imposed under its provisions; and the greater this certainty, the higher would be the market value of such securities in the hands of the holders. "One of the tests that a contract has been impaired," as said in *Planters' Bank v. Sharp*, 6 How. 327, "is, that its value has by legislation been diminished."

The question recurs, as to what effect sections 404 to 407 of the Code exert upon the remedy afforded under the act of 1868, in the matter of the collection of taxes. Does the new remedy, by which a separate bond is authorized for the collection of State and county taxes, lessen the efficacy of the prior one, by which the State certainly obligated itself to see that the holders of these contracts should receive their pay with the same certainty, at least, that the State received its own annual taxes? Does the remedy afforded by the Code so modify the previously existing one, as to substantially impair and lessen the value of these contracts? Or, in fine, does the new legislation furnish, on its face, an easy method by which the State can secure its revenue, and at the same time the holders of these county securities can be unreasonably hindered, delayed or embarrassed, in the assertion of their legal rights? *Oatman v. Bond*, 15 Wis. 28; *Cooley on Const. Lim.* 355, 358-9; *Edwards v. Kearzey*, 96 U. S. 595.

We are not able, after much consideration of the matter, to answer these questions otherwise than in the affirmative. It is obvious that the act of 1868, as we have shown, placed the holders of these county bonds upon an exact equality with the State in the method of enforcing their dues. The acts of 1876 and 1877, as embodied in the above sections of the Code, destroy this equality, by abrogating the former and more efficacious remedy. We cannot be ignorant of the fact, so amply attested by history in every age, that where States, counties or municipalities become burdened with large debts incurred in public enterprises, they not unfrequently grow restive, and even rebellious, under the weight of its oppressive exactions. And where such enterprises prove failures, and thus fall short of meeting popular expectation, it is to be expected that the resistance of public prejudice, in the exercise of financial self-preservation, will be proportionately greater. The State, by the new enactments embraced in the Code, seeks to relieve itself of this embarrassment, and, to this extent, measurably increases that of the holders of these county securities. Its own taxes can be collected with promptitude, under the provisions

authorizing a separate bond for general taxes; and an easy way is provided by which the taxes due the county creditors may at the same time not be collected. The special tax-collector, authorized to be appointed by the governor, in the event of the regular collector's refusing to give a bond for the collection of special taxes, is required to be a citizen of the county whose inhabitants owe the taxes, and so with the securities on his bond. Public sentiment in the debtor locality may thus frown down, and easily defeat the acceptance of the office, or the execution of a proper bond. The moral influence of the State, with its vast interest and aid, possessed by virtue of its sovereign power to coerce the settlement of its own taxes, is lost. There is a divorcement of the identity of interest and power pledged to this end by the act of 1868. The force of public opinion favoring the exact equality of taxation for the current expenses of the State, which must be co-extensive with the whole State outside of the counties specially taxed—an opinion which sooner or later must find suitable embodiment in vigorous laws—can no longer be brought under legitimate contribution to coerce, in like manner, the collection of such special taxes, as was contemplated and pledged when the contract in question was made. These views derive new force from the theory of our constitution, Federal as well as State, that governments “derive their just powers from the consent of the governed;” or, in other words, as expressed in the Declaration of Rights, in our present constitution, that “all political power is inherent to the people, and all free governments are founded on their authority.” Decl. Ind., U. S. Const.; Const. (1875), Ala. Decl. Rights, § 3. The cases, indeed, are multitudinous, where laws become mere dead letters, because their attempted enforcement is defeated by the resisting power of public opinion.

Our opinion is, that the sections of the present Code under discussion (§§ 404–407, inclusive) materially impair the remedy afforded for the enforcement of contracts made under the act of December 31, 1868, and of the kind to which we have alluded, and that the new remedy provided is not a substantial and adequate one according to the course of justice as it existed at the time the contract in question was made. The efficacy of the former remedy has been lessened, so as to weaken the binding force of such contracts, and render still more embarrassing the difficulties of their enforcement. As to such contracts, therefore, these sections are inoperative, and must, to this extent, be declared unconstitutional and void. Cooley on Const. Lim. 350, note 4, and cases cited; *United States v. Lincoln County*, Dillon Cir. Ct. Rep. 184; *Louisiana v. New Orleans*, 102 U. S. 203; *Edwards v. Kearzey*, 96 U. S. 595; *Gunn v. Barry*, 15 Wall. 610.

The judgment of the circuit court, granting the writ of manda-

mus, is hereby reversed, and the application is dismissed at the cost of the petitioner.

Legislative Restrictions on Power of Municipal Taxation as Affecting Existing Contracts.—A State law cannot so impair the right of a municipality to impose taxation as to render it impossible for it to meet its obligations already contracted. *Gilman v. City of Sheboygan*, 2 Black. 510; *Von Hoffman v. City of Quincy*, 4 Wall. 588; *Lansing v. County Treasurer*, 1 Dill. 522; *Goodale v. Fennell et al.*, 27 Ohio St. 426; *State v. Common Council of Madison*, 15 Wis. 80; *Smith v. City of Muscatine*, 8 Wall. 579; *Wolff v. New Orleans*, 108 U. S. 358; s. c., 12 Am. & Eng. R. R. Cas. 625.

The mode of collecting the tax may, however, be altered at will, so long as the power is retained to tax sufficiently to meet outstanding obligations. *People v. Woods*, 7 Cal. 579; *People v. McLane*, 10 Cal. 563.

Judicial Construction of Law so as to Restrict Power of Municipal Taxation.—A judicial as well as a legislative restriction of the power of municipal taxation is likewise unconstitutional. *Butz v. City of Muscatine*, 8 Wall. 579.

INDEX.

The mode of citing the American and English Railroad Cases is as follows:
16 Am. & Eng. R. R. Cas.

ACCOUNT.

See EQUITY.

ACKNOWLEDGMENT.

It is not necessary that the acknowledgment of articles of incorporation should show that the persons acknowledging were personally known to the acknowledging officer to be the persons who executed the articles. *People ex rel. v. Cheeseman et al.*, xvi. 400.

ACT OF ASSEMBLY.

See STATUTE.

ACT OF GOD.

See CARRIERS.

ACTION.

When railroad company is sued, it may be designated by name without averment of corporate capacity. If this is disputed, objection should be taken by answer and not by demurrer. *Stanly v. Richmond & D. R. Co.*, xvi. 545.

ADMINISTRATORS AND EXECUTORS.

Cause of action for death arises where death occurred and not at place of appointment of administrator. *Lung Chung, Adm'r, v. Northern Pac. R. Co.*, xvi. 548.

ADMIXTURE.

Party may recover from warehouseman value of grain belonging to him, with interest, when same has been mixed with other grain of like quality and is destroyed by fire occasioned by negligence. No such conversion is worked by admixture as to deprive owner of his property. *Arthur v. Chicago, R. I. & P. R. Co.*, xvi. 283.

AGENTS AND AGENCY.

See SERVANTS.

A station agent who ships his own goods at a higher rate than allowed by law cannot recover the excess paid by him to the company. *Steever v. Illinois Central R. Co.*, xvi. 53.

AGENTS AND AGENCY—Continued.

When baggage agent accepts tent and fittings as baggage, company is liable for it as baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, xvi. 116.

Company is liable for salesman's samples as baggage when baggage agent knowingly receives them as such. *Texas, etc., R. Co. v. Capps*, xvi. 118.

When such baggage arrives and station master, not knowing its nature, agrees to hold it, company is liable as warehouseman only. *Texas, etc., R. Co. v. Capps*, xvi. 118.

Company is bound by act of baggage master in checking baggage by wrong system of connecting lines. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Declarations of superintendent as to acceptance or non-acceptance of wood furnished by him to the company are admissible. *Sacalaris v. Eureka & P. R. Co.*, xvi. 580.

Station agent is officer examinable under Rev. Stat. of Ontario, ch. 50, sect. 156, as to matters in question in action brought against company. *Ramsay v. Midland Ry. Co.*, xvi. 594.

Declarations of agent made after conclusion of contract are inadmissible as to alleged misrepresentations in negotiations. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

AMENDMENT.

Where case is remanded on appeal to United States circuit court, power of latter to amend pleadings is not affected. Supreme Court cannot prescribe amendments to be allowed or mode of conducting subsequent proceedings. *Branson v. Oregonian Ry. Co.*, xvi. 517.

ANIMALS.

See **FENCES.**

Complaint alleging negligence in running train on straight part of track without obstructions to hide cattle from engineer's view and striking same when proper care and vigilance would have prevented accident is sufficient. *Stanly v. Richmond & D. R. Co.*, xvi. 545.

Expert evidence is not admissible to effect that cattle-guard was necessary at certain point. *Amstein v. Gardner*, xvi. 585.

When horse escapes through negligence of owner and runs a long way and then gets upon track at unfenced point and is killed at a point still further on, question of contributory negligence is for jury. *Amstein v. Gardner*, xvi. 585.

APPEALS.

Decree ordering railroad company to carry for express company at reasonable rates, and fixing for time being maximum of what is reasonable, is appealable. *St. Louis, I. Mt. & S. Ry. Co. v. Southern Express Co.*, xvi. 95.

Judgment which appears to be right will not be reversed for an error without prejudice. *Mobile & M. R. Co. v. Jurey*, xvi. 132.

Where charge contains two propositions, of which one only is correct, judgment will not be reversed upon general exception. *Mobile & M. R. Co. v. Jurey*, xvi. 132.

Assignment of error that appellant was not allowed to prove certain facts is insufficient unless it is also alleged that witness would have stated those facts. *Louisville, C. & St. L. R. Co. v. Sullivan*, xvi. 890.

Order as to change of venue is reviewable by appellate court. *Pittsburgh, W. & K. R. R. Co. v. Applegate & Son*, xvi. 440.

When United States Supreme Court remands case to circuit court, it cannot prescribe amendments to pleadings which can be allowed. Circuit court has full power as to such amendments. *Branson v. Oregonian Ry. Co.*, xvi. 517.

Refusal of court to grant new trial is not reviewable on error. *Terra Haute & I. R. Co. v. Struble*, xvi. 597.

ASSIGNMENT.

Upon payment of total loss by insurer, an equitable assignment of claim against carrier is worked. Suit lies in name of original insurer, and real plaintiff need only establish original cause of action. Such real plaintiff is dominus litis, and a plea not averring payment to him or his assignor before he acquired title is bad. *Mobile & M. R. Co. v. Jurey*, xvi. 132.

Contract to build railroad passes to assignees for benefit of creditors. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

ATTACHMENT.

See GARNISHMENT.

ATTORNEY.

Directors may employ solicitor at fixed salary. Shareholders cannot undo arrangement in respect of past services. *Falkiner v. Grand Junction R. Co.*, xvi. 591.

BAGGAGE.

Where agent of company receives tent and fittings as baggage, company is liable for it as baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, xvi. 116.

Company is liable for salesman's samples as baggage where baggage agent knowingly receives them as such. *Texas, etc., R. Co. v. Capps*, xvi. 118.

When such baggage arrives and the station master, being ignorant of its nature, agrees to hold it, company is liable as warehouseman only. *Texas, etc., R. Co. v. Capps*, xvi. 118.

Carriers of passengers bound to carry baggage in reasonable amount without extra compensation. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Court will take judicial notice of system of checking baggage over connecting lines. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Usual baggage check is mere voucher or token and not a contract of carriage. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

When baggage master checked trunks over wrong system of connecting lines, and loss occurred beyond the company's line, it was held liable. Whether plaintiff was guilty of contributory negligence in failing to detect error from check in his possession was for jury. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Carrier giving through check without limiting its liability, is responsible for safe carriage of baggage beyond its own line to destination. Compromise with other lines does not alter its liability. *Louisville & N. R. Co. v. Weaver*, xvi. 218.

BANKRUPTCY.

In action against assignee in bankruptcy for fraud of assignor, statute of limitations only runs from time fraud is discovered. Assignee is chargeable with notice of the concealment and when facts are such as to conceal themselves, no proof of actual concealment by assignee is necessary. *Cook et al. v. Sherman et al.*, xvi. 561.

BILLS OF LADING.

See CARRIERS; CONNECTING LINES.

Until bill of lading is signed railroad company is liable as warehouseman only, and not as carrier. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

In suit against express company for loss of goods, clerk of defendant may be asked whether plaintiff usually put weight on receipts, in order to contradict a statement to that effect made by plaintiff's clerk. *Adams Express Co. v. Boskowitz*, xvi. 102.

Where form used was that of another company, it is error to charge that

BILLS OF LADING—Continued.

clauses limiting liability do not enure to benefit of company to whom goods are committed. Whether this is so or not is to be determined from the circumstances. *Adams Express Co. v. Boskowitz*, xvi. 102.

Omission to state value of package is not a fraud, notwithstanding clause in bill of lading limiting liability of carrier. *Adams Express Co. v. Boskowitz*, xvi. 102.

Where goods are carried at a reduced rate at an agreed valuation, represented by shipper to be true one, he cannot in case of loss recover more than valuation. *Graves v. Lake Shore & M. S. R. Co.*, xvi. 108.

Written contract as to carriage of live-stock containing conditions limiting liability is, in absence of mistake or fraud, sole evidence of agreement, though signed in a hurry by shipper and with a previous verbal understanding as to terms of shipment. *St. L., K. C. & N. R. Co. v. Cleary*, xvi. 122.

Where carrier verbally agreed to give rebates and afterwards gave a bill of lading containing no such provision, *held* that rebates were not recoverable. *Hopkins v. St. Louis & S. F. R. Co.*, xvi. 126.

Evidence is competent to show that a bill of lading does not embody the contract of transportation, and that the same lies partly in parol. *Mobile & M. R. Co. v. Jurey*, xvi. 182.

Court in construing bill of lading will consider subject-matter and surrounding circumstances. *Mobile & M. R. Co. v. Jurey*, xvi. 182.

In view of the parol evidence in this case, the clauses in the bill of lading limiting liability were not held to be applicable. *Mobile & M. R. Co. v. Jurey*, xvi. 182.

When party insures goods in transit under policy securing to insurer right of subrogation to claim against carrier in case of loss, and subsequently ships said goods under bill of lading securing to carrier in case of loss benefit of insurance, latter clause is valid, and shipper cannot upon loss recover from insurer, having deprived him of his right of subrogation. *Carstairs v. Mechanics' & Traders' Ins. Co.*, xvi. 142.

Carrier cannot stipulate for exemption from responsibility for negligence of himself or his servants. When accident occasioning loss is such as does not happen in ordinary course of things, presumption of negligence arises. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

Carrier losing goods through negligence may avail himself of clause in bill of lading securing to him benefit of insurance effected by shipper. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

Carrier is liable for negligent loss of goods, though same were to be transported "at owners' risk." Failure to deliver goods presents prima facie presumption of negligence, which is for jury. When facts are shown amounting to negligence which might have occasioned loss, whether or not they did so occasion loss, is for jury. *Canfield et al. v. Baltimore & Ohio R. Co.*, xvi. 152.

Clause in bill of lading limiting the amount of carrier's liability does not apply where loss is occasioned through negligence of carrier. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, xvi. 158.

When complaint avers breach of duty as common carrier, and evidence discloses special written contract of carriage not declared on, the variance is fatal. *Hall v. Pennsylvania Co.*, xvi. 165.

Terms of contract for transportation of live-stock construed to require owner to feed them in certain specified emergencies, but not to require carrier to feed them in all other cases. *Louisville & Nashville R. Co. v. Trent*, xvi. 170.

Contract of railroad company to carry fish at one fifth under ordinary rates in consideration of release of all liability, even for negligence of its servants, *held* reasonable and binding. *Manchester, S. & L. R. Co. v. Brown*, xvi. 174.

A railroad company is not a common carrier beyond its own line. It may therefore in South Carolina limit its liability in regard to such transportation as it pleases by provisions in the bill of lading. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Signature of shipper is not necessary to establish assent to bill of lading. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

BILLS OF LADING—Continued.

Construction is for court; but where there is dispute as to which of two agreements the parties acted under, the question is for jury. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Company may contract not to be liable beyond its own line. Contract in this case held to have clearly that effect. *Berg et al. v. Atchison, T. & S. F. R. Co.*, xvi. 229.

When clause in bill of lading exempted company from liability for loss by fire when goods stored and fire occurred after delivery by railroad at steamship wharf, *held*, company was not liable. *Deming v. Norfolk & W. R. Co.*, xvi. 232.

Stipulation requiring notice of claim for injury to live stock by shipper before stock is moved from destination or mixed with other stock, is binding. *Texas Central R. Co. v. Morris*, xvi. 259.

Terms of bill of lading held to require delivery of specific grain shipped, and not to be satisfied by tender to consignee of other grain of exactly similar quality. *Leader v. Northern R. R. Co. et al.*, xvi. 287.

Where railroad company issued two delivery orders for same grain but so different that they might reasonably be supposed to refer to different consignments, and a party made advances on both orders, *held*, company was estopped as to him to show real state of case, and must respond in damages. *Coventry & Co. v. Great Eastern R. Co.*, xvi. 292.

BONDS.

Company held bound by improper issue of scrip convertible into bonds as dividend on preferred stock, when it had recognized validity of most of scrip and issued bonds to take it up. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Holder of bonds convertible into stock cannot by consolidation be deprived of right to convert them, unless after notice and fair opportunity he elects not to do so. *Rosenkrans v. Lafayette, B. & M. R. R. Co.*, xvi. 488.

When lessee of road undertakes to pay by way of rent the coupons or bonds of lessor as they mature, it may be compelled by lessee to do so. *Woodruff v. Erie R. Co. et al.* xvi. 501.

From lessor to lessee held by its terms to cover any claim of lessee against lessor for money paid to take up coupons on lessor's bonds in pursuance of terms of lease. *Stewart et al. v. Hoyt's Exr's*, xvi. 518.

When station agent is at time of signing of his official bond in default and indebted on pre-existing agency, it is no fraud for the company to fail to notify the sureties of the fact, but it is a fraud for them to hold him out to the sureties expressly or implicitly as trustworthy, and in such case liability of sureties is discharged. *Wilmington, etc., R. Co. v. Ling*, xvi. 539.

Where company retains station agent after default, without notifying sureties, latter are relieved from all further liability. *Wilmington, etc., R. Co. v. Ling*, xvi. 539.

Bonds issued on account of construction contract held valid to extent of benefit received by construction, though contract is fraudulent in its nature. *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

CANADA.

Crown is not liable for injury to passenger on railway owned and operated by the Dominion of Canada. *Queen v. McLeod*, xvi. 801.

CARRIERS.

See **BAGGAGE; BILL OF LADING; CONNECTING LINES; DISCRIMINATION; EXPRESS COMPANIES; WAREHOUSEMAN.**

GENERAL PRINCIPLES.

In suit against carrier to recover value of goods lost, in order to recover owner must prove that railroad company was common carrier, that it received goods as

CARRIERS—Contin

freight and that it failed to deliver them. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

Company is not liable as carrier for goods delivered upon its platform for transportation until it gives a bill of lading. Custom does not alter this rule. Until then company is liable as warehouseman only. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

Is liable for loss of goods unless occasioned by act of God or public enemy. *Texas Express Co. v. Scott*, xvi. 111.

Railroads are not in the carriage of live-stock bound as common carriers. They are only bound to use due and proper care and deliver in reasonable time. *Baker et al. v. Louisville & N. R. Co.*, xvi. 149.

Carriers of passengers are bound to carry baggage in reasonable amount without extra compensation. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

The test of a common carrier is whether or not it is bound to carry for all alike. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

EXCESSIVE FREIGHT CHARGES AND DISCRIMINATIONS.

Charge of excessive freights may be prevented by appropriate penalties as to railroads wholly within the State. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

Tennessee law providing for railroad commission to prevent unjust discriminations and overcharges on freight *held* invalid, as too vague, as discriminating unfairly against railroads, and as a regulation of inter-State commerce. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

State act fixing maximum rates for transportation of freight and passengers is unconstitutional as regulation of inter-State commerce, so far as it relates to shipments over inter-State lines. *Kaiser v. Illinois Central R. Co.*, xvi. 40.

Law making agent guilty of misdemeanor in exacting excessive freight charges does not take away common-law right to recover back money paid in excess of reasonable compensation. Protest prior to payment need not be shown. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Action may be brought to recover excess in charge for freight within five years, though prosecution for offence in exacting it must be brought within two years. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Where by terms of contract of affreightment liability of company is limited to its own line within State, statute prohibiting freight charges beyond a sum certain is constitutionally applicable. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Where maximum freight is fixed by statute, larger sum cannot be demanded, and evidence that higher rates are chargeable is not admissible. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Bill against several defendants for discovery, account, and repayment of unlawful overcharges in freight will not lie because one defendant is lessee of several lines and lessors, the other defendants, are also liable, and plaintiff must at law sue each for proportional part of the overcharge. *Scott v. Erie R. Co.*, xvi. 58.

A station agent who ships his own goods at a higher rate than allowed by law cannot recover excess paid by him to company. *Steever v. Illinois Central R. Co.*, xvi. 58.

Constitutional provision prohibiting discrimination in charges or transportation facilities not construed to require a company which has made a business connection with another line at a certain point to extend same facilities to another rival line connecting with it at another point. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional provision that every railroad shall have right to intersect, connect with, or cross another, confers merely right to mechanical connection and not to connect business with business. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional prohibition against discriminating in rates is not violated by

CARRIERS—Continued.

refusing to give to one connecting road the same arrangements as to through rates given to another, unless the conditions of service are substantially alike. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

RUNNING TRAINS TO STATIONS.

Kansas City, St. J. & C. B. Co. is bound by its charter to run a through train daily between St. Joseph and Savannah, but it need not make latter place station on main track, nor need it run all trains to old depot. It may make switch to old depot, and need run but one train a day over it. *State ex rel. v. Kansas City, St. J. & C. B. R. Co.*, xvi. 297.

Failure of company to run trains to original terminus held under circumstances not to warrant court in declaring franchises forfeited, the public at large not being injured. *Att'y-Gen'l v. Erie & Kalamazoo R. Co.*, xvi. 652.

EXPRESS FACILITIES.

Railroad companies are bound to furnish to express companies all usual express facilities. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Court in ordering provisionally railroad company to furnish express facilities at reasonable rates will assume that rates paid in the past were reasonable. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Railroad must afford same facilities to one express company as to another, at same rates, and must use reasonable diligence to see that one company is not obtaining rates lower than the other. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

Ferriage on railway ferry if furnished to one express company must also be furnished to another. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

CONNECTING LINES.

When baggage master checked trunks over wrong system of connecting lines, and loss occurred beyond the company's line, it was held liable. Whether plaintiff was guilty of contributory negligence in failing to detect the error from the check in his possession was for jury. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

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Carrier giving through check without limiting its liability is responsible for safe carriage of baggage beyond its own line to point of destination. Compromise with other lines does not alter its liability. *Louisville & N. R. Co. v. Weaver*, xvi. 218.

May contract not to be liable beyond its own line. Contract in this case held to be unambiguous and clearly to that effect. *Berg et al. v. Atchison, T. & S. F. R. Co.*, xvi. 229.

By terms of bill of lading company was exempted from liability for loss by fire or for loss beyond its own line. Cotton was delivered in good time at steamboat wharf, and while in storage awaiting transportation was burned: *Held*, that company was not liable. *Deming v. Norfolk & W. R. Co.*, xvi. 232.

Agreement in this case between connecting lines as to through freights not construed to render companies partners and liable for each other's acts and omissions. *Deming v. Norfolk & W. R. Co.*, xvi. 232.

BAGGAGE.

When baggage agent accepts tent and fittings as baggage, company is liable for it as baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, xvi. 116.

Company is liable for salesman's samples as baggage when baggage agent knowingly receives them as such. *Texas, etc., R. Co. v. Capps*, xvi. 118.

When such baggage arrives at destination and station master, being ignorant

CARRIERS—Continued.

as to its nature, agrees to hold it, company is liable as warehouseman only. *Texas, etc., R. Co. v. Capps*, xvi. 118.

Court will take judicial notice of system of checking baggage over connecting lines. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Usual baggage check is mere voucher or token and not a contract of carriage. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Company is liable for loss of baggage beyond its own lines when checked by mistake of its agent over wrong system of connecting roads. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

**SPECIAL CONTRACTS OF TRANSPORTATION AND HEREIN OF CONTRACTS
LIMITING LIABILITY.**

Declarations made in private by shipper of goods to his clerk as to agreement by him with express company as to carriage, are inadmissible in suit against company for loss of goods. *Adams Express Co. v. Boskowitz*, xvi. 102.

In suit against express company for loss of goods, clerk of defendant may be asked whether plaintiff usually put weight on receipts to contradict a statement to that effect by plaintiff's clerk. *Adams Express Co. v. Boskowitz*, xvi. 102.

Where form used for bill of lading was that of another company, it is error to charge that clauses limiting liability do not enure to benefit of company to whom goods are entrusted. Whether or not this is so is to be determined from the circumstances. *Adams Express Co. v. Boskowitz*, xvi. 102.

Omission to state value of package is not a fraud, notwithstanding clause in bill of lading limiting liability of carrier. *Adams Express Co. v. Boskowitz*, xvi. 102.

Where goods are carried at a reduced rate at an agreed valuation represented by shipper to be the true one, he cannot in case of loss recover more than said valuation. *Graves v. Lake Shore & M. S. R. Co.*, xvi. 108.

Fraudulent misrepresentation by shipper as to value of goods will discharge the carrier. But shipper is not bound to disclose contents of trunk when not asked. *Texas Express Co. v. Scott*, xvi. 111.

Written contract as to carriage of live-stock containing conditions limiting liability is in absence of mistake or fraud sole evidence of agreement, though signed in a hurry by shipper and with previous verbal understanding as to terms of shipment. *St. L., K. C. & N. R. Co. v. Cleary*, xvi. 122.

Where carrier verbally agreed to give rebates, and afterwards gave a bill of lading containing no such provision, *held* that rebates were not recoverable. *Hopkins v. St. Louis & S. F. R. Co.*, xvi. 126.

Evidence is competent to show that a bill of lading does not embody the true contract of transportation and that same lies partly in parol. *Mobile & M. R. Co. v. Jurey*, xvi. 132.

In view of the parol evidence in this case the clauses in the bill of lading limiting liability were held inapplicable. *Mobile & M. R. Co. v. Jurey*, xvi. 132.

Carrier cannot contract for exemption from liability for negligence of himself and his servants. When accident occasioning loss is such as does not happen in ordinary course of things, presumption of negligence arises. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

Carrier is liable for loss of goods occasioned by his negligence, though same were to be transported "at owner's risk." Failure to deliver goods presents prima facie presumption of negligence, which is for jury. When facts are shown amounting to negligence which might have occasioned loss, whether or not they did so occasion loss is for jury. *Canfield et al. v. Baltimore & Ohio R. Co.*, xvi. 152.

Clause in bill of lading limiting amount of carrier's liability does not apply when loss is occasioned by carrier's negligence. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, xvi. 158.

Terms of contract for transportation of live-stock construed to require owner

CARRIERS—Continued.

to feed them in certain specified emergencies, but not to require carrier to feed them in all other cases. *Louisville & N. R. Co. v. Trent*, xvi. 170.

Contract of railroad company to carry fish at one fifth less than ordinary rates in consideration of release of all liability, even for negligence of servants, *held* reasonable and binding. *Manchester, S. & L. R. Co. v. Brown*, xvi. 174.

A common carrier cannot in South Carolina limit his liability. One not a common carrier may do so. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Signature of shipper is not necessary to establish assent to bill of lading. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Construction of bill of lading is for court; but where there is doubt as to which of two agreements the parties acted under, the question is for jury. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Stipulation in bill of lading requiring notice of claim for injury to live stock by shipper before stock is moved from destination or mixed with other stock, is binding. *Texas Central R. Co. v. Morris*, xvi. 259.

INSURANCE.

Upon payment of total loss by insurer, an equitable assignment of the claim against the carrier is brought about. Suit lies in the name of the original insurer, and real plaintiff need only establish original cause of action. Such real plaintiff is dominus litis, and a plea which does not aver payment to him or to his assignor before he acquired his right is bad. *Mobile & M. R. Co. v. Jurey*, xvi. 182.

When party insures goods in transit under policy securing to insurer right of subrogation to claim against carrier in case of loss, and subsequently ships said goods under bill of lading securing to carrier in case of loss the benefit of insurance, he cannot upon loss recover from insurer, having deprived him of his right of subrogation. *Carstairs v. Mechanics & Traders' Ins. Co.*, xvi. 142.

Carrier losing goods negligently may avail himself of clause in bill of lading securing to him benefit of insurance effected by shipper. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

DELIVERY.

Delivery of wheat to consignee without payment by him of whole price amounted under the circumstances to conversion. In mitigation of damages it could, however, be shown that consignee subsequently settled for the wheat. *Jellets v. St. Paul, M. & M. R. Co.*, xvi. 246.

When A representing himself to be B, orders goods shipped to B, carrier is not responsible if he delivers them to A. *Edmunds v. Merchants' Despatch Trans. Co.*, xvi. 250.

When A represents himself to be agent of B and orders goods shipped to B, carrier is not warranted in delivering to A. *Edmunds v. Merchants' Despatch Trans. Co.*, xvi. 250.

Complaint not sufficient to entitle party to recover from company for delivery of wrong casks into which without examination he poured ketchup which was spoiled by contact with remains of former contents. *Cunningham v. Great Northern R. Co.*, xvi. 254.

When car arrived at destination and was put on side-track for consignee, and after lapse of several days goods therein were found missing, *held*, that there had been a delivery and that burden was on plaintiff to show that loss had occurred before car was put on side-track. *South & North Ala. R. Co. v. Wood*, xvi. 267.

Where goods arrived at station but consignee was repeatedly informed they had not arrived and then same were destroyed by fire, company was held liable as a common carrier. *Burlington & M. R. Co. v. Arms*, xvi. 272.

Carrier notified purchaser that he claimed lien on second part of consignment of coal for freight of whole lot. Purchaser took the said part: *Held*, that this did not imply as matter of law a promise by him to pay the carrier the whole freight. *New York & N. E. R. R. Co. v. Sanders*, xvi. 280.

CARRIERS—Continued.

The peculiar terms of this contract held to require delivery of the specific grain shipped and not to be satisfied by a tender to the consignee of other grain of the same grade. *Leader v. Northern R. R. Co. et al.*, xvi. 287.

Where railroad company issued two delivery orders for same grain, but so different that they might reasonably be supposed to refer to different consignments, and a party made advances on both orders: *Held*, that company was estopped as to said party to show that orders both related to same consignment, and that it was bound to compensate him for advances made. *Coventry & Co. v. Great Eastern R. Co.*, xvi. 292.

DAMAGES.

Where horses are injured in transit, damages may be measured by proof of their value in market of neighboring State. Evidence of their depreciation in value at point of destination is not indispensable. *Louisville & N. R. Co. v. Mason*, xvi. 241.

Where seed corn on the ear was injured in transportation by shelling, plaintiff may prove that he warned the company on shipment that it was seed corn, though there is no averment to that effect in complaint. *Missouri Pac. R. Co. v. Nevin*, xvi. 252.

PLEADING.

When complaint avers breach of duty as common carrier and evidence discloses special written contract of carriage not declared on, the variance is fatal. *Hall v. Pennsylvania Co.*, xvi. 165.

The complaint in this case for delay in delivering cattle *held* defective in that it did not state what part of the delay was caused by failure to furnish cars and what part by stoppages en route. *Ayres et al. v. Chicago & N. W. R. Co.*, xvi. 171.

Where cause of action was failure to furnish cars to transport stock and failure to transport them expeditiously, the allegations of complaint were *held* sufficiently definite except that the damages caused by each separate negligent act complained of were not stated. *Richardson v. Chicago & N. W. R. Co.*, xvi. 172.

OTHER MATTERS.

Party who transmits money to owner may recover for loss thereof. *Snider v. Adams Express Co.*, xvi. 261.

In an action for delay in transporting goods, part of which occurred more than six years before suit brought and part within that time, plaintiff may recover for latter part of delay. *Jones v. Grand Trunk R. Co.*, xvi. 265.

Agent of common carrier is bound to use reasonable diligence in examining unclaimed parcels so as to discover their contents, but he cannot break them open. In advertising them for sale he must give full description. Sale in this case held void for failure to observe above rules. *Nathan Bros. v. Shivers*, xvi. 276.

CATTLE.

See **ANIMALS; CARRIERS; FENCES.**

CHANCERY.

See **EQUITY; INJUNCTION.**

CHANGE OF VENUE.

See **VENUE.**

CHARTER.

When it gives to railroad company a right to collect reasonable tolls amounts to a contract which State cannot break. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

CHECK.

Usual baggage check is mere voucher or token and not a contract of carriage. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

COMMISSION.

The Tennessee law providing for a railroad commission to prevent unjust discriminations and extortionate freight charges *held* invalid as too vague, discriminating unfairly against railroad companies, and as an attempt to regulate inter-State commerce. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

COMMON CARRIERS.

See **CARRIERS.**

CONNECTING LINES.

See **BILL OF LADING; CARRIERS.**

Tennessee law providing for railroad commission to prevent unjust discriminations and overcharges in freight *held* invalid as applied to connecting lines running out of the State, as an attempt to regulate inter-State commerce. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

State act fixing maximum rates for transportation of freight and passengers is unconstitutional as regulation of inter-State commerce so far as it relates to shipments on inter-State lines. *Kaiser v. Illinois Central R. Co.*, xvi. 40.

Where by terms of contract of affreightment liability of company is limited to its own line wholly within State, statute prohibiting freight charges beyond a sum certain is constitutionally applicable. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Constitutional provision prohibiting discrimination in charges or transportation facilities not construed to require a company which has made business connection with another line at a certain point to extend same facilities to another rival line connecting with it at another point. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional provision that every railroad shall have right to connect with another, only confers right to connect physically and not to connect business with business. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Company is not bound to carry beyond its own line. If it chooses to do so, it may make choice of its agents for that purpose. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Company is not bound to construct or maintain stations at points where other line intersects. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional prohibition against discrimination in rates is not violated by refusing to give to one connecting road the same arrangements as to through rates given to another, unless the conditions of service are substantially alike. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Court will take judicial notice of system of checking baggage over connecting lines. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

When baggage master checked trunks over wrong system of connecting lines and loss occurred beyond the company's line, it was held liable. Whether plaintiff was guilty of contributory negligence in failing to detect error from check in his possession was for jury. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

A railroad company is not a common carrier beyond its own line. It may therefore in South Carolina limit its liability as to such transportation as it pleases by provisions in the bill of lading. *Piedmont M'f'g Co. v. Columbia & G. R. Co.*, xvi. 194.

Carrier giving through check without limiting its liability is responsible for safe carriage of baggage beyond its own line to destination. Compromise with other lines does not alter its liability. *Louisville & N. R. Co. v. Weaver*, xvi. 218.

Company may contract against extra terminal liability. Contract in this case

CONNECTING LINES—Continued.

held to be clearly to that effect. *Berg et al v. Atchison, T. & S. F. R. Co.*, xvi. 229.

Agreement between connecting carriers as to through freights, each being by terms of bill of lading responsible only for his own acts or omissions, does not constitute them partners and liable for each other's acts or omissions. *Deming v. Norfolk & W. R. R. Co.*, xvi. 232.

When by terms of bill of lading company was exempt from liability for loss by fire or beyond its own line, and delivered goods at steamboat wharf, and while in storage awaiting transportation same were burned. *Held*, company was not liable. *Deming v. Norfolk & W. R. Co.*, xvi. 232.

Party in street car who is familiar with practice, receiving by mistake of conductor wrong transfer check, is not entitled to ride thereon in the connecting street car. *Bradshaw v. South Boston R. Co.*, xvi. 363.

CONSOLIDATION.

Where companies of different States consolidate so as to form continuous line, one State cannot pass law regulating rates of freight and prohibiting discrimination. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

Holder of bonds convertible into stock cannot by consolidation be deprived of right to convert them unless after notice and fair opportunity he has elected not to exercise his option. *Rosenkrans v. Lafayette, B. & M. R. R. Co.*, xvi. 483.

Companies chartered under laws of different States and consolidated under laws of both are separate in that each State retains control over charter granted by it but identical in that the corporations may represent each other in suits by or against either of them. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 483.

Suit by State against one of its corporations for relinquishing powers to another corporation with which it has been consolidated under law of U. S. is suit arising under U. S. laws and may be moved to U. S. court. *Ames v. Kansas ex rel.*, xvi. 522.

When corporations have been consolidated by law, court cannot terminate existence of consolidated company on ground of fraud or defect in consolidation proceedings. *Terhune v. Midland R. R. of N. J.*, xvi. 665.

CONSTITUTIONAL LAW.

The Tennessee law providing for a railroad commission to prevent unjust discrimination and overcharges in freight *held* invalid as too vague, as discriminating unfairly against railroads, and as a regulation of inter-State commerce. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

State act fixing maximum charges for transportation of freight and passengers is unconstitutional as regulation of inter-State commerce so far as it relates to shipments over inter-State lines. *Kaeiser v. Illinois Central R. Co.*, xvi. 40.

Where by terms of contract of affreightment liability of company is limited to its own line within State, statute prohibiting freight charges above a certain sum is constitutionally applicable. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

Constitutional provision prohibiting discrimination in charges or transportation facilities not construed to require a company which has made business connection with another line at a certain point, to extend same facilities to another rival line connecting with it at another point. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional provision that every railroad shall have right to intersect, connect with or cross another, gives right to mechanical union only and not the right to connect business with business. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional prohibition against discrimination in rates is not violated by refusing to give one connecting road the same arrangements as to through rates which are given to another, unless the conditions of service are substantially alike. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

CONSTITUTIONAL LAW—Continued.

Act approving change of corporate name not obnoxious as private charter or grant of special privileges. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

The court declines to decide that Congress may not confer on inferior courts jurisdiction in cases where by constitution Supreme Court of U. S. has original jurisdiction. *Ames v. Kansas ex rel.*, xvi. 522.

Corporation will not be ousted of franchises because original act of incorporation does not appear to have been passed by constitutional majority, when there has been great lapse of time and confirmatory legislation. *Attorney-Gen'l v. Joy*, xvi. 648.

An act enabling company incorporated under special act to change name and extend road is not obnoxious as an act renewing or extending special act of incorporation. *Attorney-General v. Joy*, xvi. 648.

Act will not be declared invalid after lapse of thirty years because title embraces two objects. *Attorney-General v. Joy*, xvi. 648.

Act enabling creditors to enforce their demands by sale and transfer of franchises is not obnoxious because it creates new corporations with old chartered powers. *Attorney-General v. Joy*, xvi. 648.

When at time municipal subscription is made, tax to pay same is collected by same officer who collects State and county tax, which officer gives one bond, subsequent act authorizing appointment of special officer to collect taxes to pay municipal subscriptions with separate bond is invalid as impairing the obligation of a contract. *Edwards v. Williamson*, xvi. 668.

CONSTRUCTION.

See **CONTRACT; CONTRACTOR.**

Bonds issued on account of construction contract held valid to extent of benefit received by construction, though contract is tainted by fraud because officers are interested parties. *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

Stockholders alone have equity to restrain suit on illegal construction contract in which officers are interested. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

Granting of construction contract to company in which officers were interested *held*, not to be a fraud where stockholders of railroad company had opportunity to become members of construction company. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

Parties contracting to build road cannot recover for rise in price of rails during delay occasioned by railroad company in procuring right of way. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Representations of president as to capacity of chief engineer of company made to other contractors but not communicated to those agreeing to build road are inadmissible when offered by the latter. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

President and chief engineer may testify that their representations and estimates in entering into construction contract were made in good faith. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Letter was admissible in evidence under circumstances to show position of parties. Receipt of same might be inferred from subsequent conduct and relation of parties. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Contractor agreed that material furnished by him should become property of company as soon as estimated by engineer. He sublet job of fencing. Contractor was paid 85 per cent on monthly estimates. Sub-contractor furnished timber but did not do work in time specified and company took possession of timber. Contractor had before this surrendered contract. *Held*, that sub-contractor might recover from company in assumpsit. *Sherwood et al. v. Saginaw, T. & H. R. Co.*, xvi. 605.

Party undertook to build road in time specified in certain manner and at fixed price and undertook to begin work when notified by railroad company. Company without giving notice afterwards awarded contract to other party. *Held*,

CONSTRUCTION—Continued.

that it had virtually contracted with first party for construction and had been guilty of breach of contract. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

In body of construction contract specifications were referred to as annexed. *Held*, that annexation of specifications was not condition on which validity of contract depended, and that original specifications annexed were constructively part of contract. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Insolvency of party contracting to construct railroad does not exempt railroad company from liability on contract. Same passes to assignees for benefit of creditors. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

When party fails to complete construction contract because railroad company abandons construction and notifies him to stop, company cannot recover damages for failure to perform the contract within time stipulated, there being no complaint made on this ground. *Hutchinson et al. v. New Sharon, C. V. & E. R. Co.*, xvi. 617.

Contract construed to mean that wherever a cut or fill exceeded four feet in length, whole of that part should be estimated at sixteen or seventeen cents per yard from natural surface up or down, and that the part of same cut less than four feet should be estimated at twelve cents per yard. *Hutchinson et al. v. New Sharon, C. V. & E. R. Co.*, xvi. 617.

Contract will not be reformed when preponderance of evidence is with party contesting reformation. *Hutchinson et al. v. New Sharon, C. V. & E. R. Co.*, xvi. 617.

CONTRACT.

See **BILL OF LADING; CONSTRUCTION; CONTRACTOR; ILLEGAL CONTRACT; POOLING CONTRACT; RESCISSION; ULTRA VIRES.**

A agreed to construct stock-yards and railroad company agreed to send all stock transported by it to those yards, unless otherwise ordered, and to give A loading of all live-stock in city. The company having taken cattle to and from other yards not specially ordered there, *held*, that it had broken its contract, and that number of car-loads taken from other yards was admissible to measure damages. *Terre Haute & I. R. Co. v. Struble*, xvi. 597.

Parties contracting to build road cannot recover for rise in price of rails during delay occasioned by railroad company in procuring right of way. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Contract recited that parties had caused their corporate seals to be fixed and their corporate names "thereto subscribed respectively by proper officers." Seals were annexed and contract signed by president of one company and director of another. Evidence tended to show that seal was affixed by proper authority. *Held*, that there was sufficient to make contract prima facie binding. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Party undertook to build road in specified manner and at fixed price as soon as officer of railroad company should notify it that capital stock was subscribed and thirty per cent paid in. Afterwards without giving notice, contract was awarded to another party. *Held*, that contract had virtually been awarded to first party and that railroad company had broken contract. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

In body of construction contract specifications were referred to as annexed. *Held*, that annexation of specifications was not a condition on which validity of contract depended and that original specifications not annexed were constructively part of contract. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Insolvency of party contracting to construct railroad does not exempt railroad company from liability on contract. Same passes to assignees for benefit of creditors. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Contract can only be rescinded by acts or assent of both parties. It is not rescinded by insolvency of one of them. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

CONTRACT—Continued.

Filing by corporation of certificate that it is nominal organization only for liquidation and is wholly insolvent, is not conclusive upon it as to question whether it can perform its contracts. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Will not be reformed, when preponderance of evidence is with party contesting reformation. *Hutchinson v. New Sharon, C. V. & E. R. Co.*, xvi. 617.

CONTRACTORS.

See **CONSTRUCTION; CONTRACT.**

Parties contracting to build road cannot recover for rise in price of rails during delay occasioned by railroad company in procuring right of way. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Cannot offer in evidence representations of president as to capacity of company's chief engineer not made nor communicated to them. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Contractor agreed that material furnished by him should become property of company as soon as estimated by engineer. He then sublet job of fencing. Contractor was paid 85 per cent on monthly estimates. Sub-contractor furnished timber but did not do work in time specified and company took possession of timber. Contractor had before this surrendered contract. *Held*, that sub-contractor could recover from company in assumpsit. *Sherwood et al. v. Saginaw, T. & H. R. R. Co.*, xvi. 605.

Has no lien in absence of contract on subscription to stock which company has agreed with subscriber to apply to construction of particular part of road where contractor is at work. *Myer & Hay v. Dupont et al.*, xvi. 621.

There is not any trust for such contractor except as to amount of such subscription remaining in hands of company after construction of the part of the road to which subscription was to be applied. *Myer & Hay v. Dupont et al.*, xvi. 621.

CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE (CONTRIBUTORY).**

CONVERSION.

Delivery of wheat by carrier to consignee contrary to directions, without first receiving the whole purchase money, amounts to conversion. It may be shown in mitigation of damages that consignee afterwards paid for wheat in full. *Jollette v. St. Paul, M. & M. R. Co.*, xvi. 246.

Admixture of grain in elevator with other grain of like quality does not amount to a conversion. *Arthur v. Chicago, R. I. & P. R. Co.*, xvi. 288.

CONVEYANCE.

Preferred stockholder filing bill to have portion of rental on lease of road applied as dividend on preferred stock, *held*, bound to show first that a certain conveyance was void which he was held estopped to do because of adjudication on point in former suit to which he was a party. *Emerson v. New York & N. E. R. R. Co.*, xvi. 404.

CORPORATION.

See **CHARTER; FOREIGN CORPORATION.**

Public nature of railroad corporations dwelt upon and legislative power over them considered. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

Final action of stockholders in changing corporate name must be taken to have been in pursuance of order of board of directors. Such order is at any rate immaterial. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Act approving change of corporate name not obnoxious as private charter

CORPORATION—Continued.

nor as conferring special privileges. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Description of party defendant as Mo. Pac. Ry. Co., giving name of president, does not raise presumption of incorporation and is insufficient. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

Company whose purpose is as stated in articles of incorporation to build union depot and build and maintain roads to said depot to accommodate different companies will not be considered a regular railroad company. *People ex rel. v. Cheeseman et al.*, xvi. 400.

When statute provides that corporation shall not exist more than twenty years and articles of incorporation provide for fifty years' existence, corporation may exist for twenty years. *People ex rel. v. Cheeseman et al.*, xvi. 400.

Is necessary party to bill to enforce judgment against it by compelling contribution from stockholders. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

Company may be sued by name without averring corporate character. If this is denied the objection should be set up by answer. *Stanly v. Richmond & D. R. Co.*, xvi. 545.

Filing by it of certificate that it is nominal organization only for liquidation, being wholly insolvent, is not conclusive upon it as to question whether it can perform its contracts. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

COSTS.

When several defendants demur separately in equity, appearing by one solicitor and counsel, but one bill of costs will be allowed, but this will embrace special costs in each demurrer. *Terhune v. Midland R. R. Co. of N. J.*, xvi. 665.

CRIMINAL LAW.

Law making agent guilty of misdemeanor in exacting excessive freight charges does not take away common-law right to recover back money paid in excess of reasonable compensation. Protest prior to payment need not be shown. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

CROSSING.

Person injured at station while crossing track as public commonly did, by train run contrary to rules of company of which party was cognizant, held, guilty of contributory negligence in failing to look out. *Wheelwright v. Boston & Albany R. Co.*, xvi. 815.

CUSTOM.

Custom cannot change or modify provisions of statute to effect that railroad company shall not be liable as a carrier for goods left on its platform for transportation until it gives a bill of lading. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

DAMAGES.

When horses are insured by carrier while in transit, damages may be measured by proof of their value in market of neighboring State. Evidence of their depreciation in value at point of destination is not indispensable. *Louisville & N. R. Co. v. Mason*, xvi. 241.

Where person is disabled by injury for several weeks, verdict of \$400 is not excessive. *Knowlton v. Milwaukee City R. Co.*, xvi. 830.

Elements of damage in action by passenger against railroad company to recover for assault by servants. Character of passenger cannot be considered in estimating damages. *International & Gt. Northern R. Co. v. Kentle*, xvi. 837.

DAMAGES—Continued.

When jury in special findings return that actual damage done to passenger from sudden starting of train is \$800, a general verdict of \$700 will be set aside, if plaintiff is not entitled to exemplary damages. *Atchison, T. & S. F. R. Co. v. Harvey*, xvi. 352.

When passenger is expelled for non-payment of fare before he has time to borrow amount from fellow-passenger, he cannot recover exemplary damages where there was no malice on conductor's part in ejecting him. *Curl v. Chicago, R. I. & P. R. Co.*, xvi. 879.

When railroad company had broken its contract in failing to transport cattle to and from the plaintiff's stock-yards, evidence of number of car-loads taken to and from other yards was admissible to fix the damages. *Terre Haute & G. R. Co. v. Struble*, xvi. 597.

DEATH.

Cause of action for death arises where death occurred and not at place of appointment of administrator. *Lung Chung, Adm'r, v. Northern Pac. R. Co.*, xvi. 548.

DEBTOR AND CREDITOR.

Where all property of private railroad corporation is purchased in good faith, same is not subject to claims of creditors of corporation, though purchaser had notice of existence of debts. *Branson v. Oregonian R. Co.*, xvi. 517.

DECLARATIONS.

Of superintendent as to acceptance or non-acceptance of wood by him on behalf of company are admissible in evidence. *Sacalaris v. Eureka & P. R. Co.*, xvi. 580.

Of agent made subsequent to negotiations culminating in contract are inadmissible as to alleged misrepresentations. *Phelps & Co. v. George's Creek & O. R. Co.*, xvi. 600.

DEEDS.

See CONVEYANCE.

DIRECTORS.

SEE OFFICERS.

DISCRIMINATION.

May be restrained by appropriate penalties, but law must be confined in its operation to railroads wholly within State. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

Law preventing discrimination as applied to railroads out of State is void as regulation of inter-State commerce. *Louisville & N. R. Co. v. Railroad Comm.*, xvi. 1.

Constitutional provision prohibiting discrimination in charges or transportation facilities not construed to require a company which has made a business connection with another line to extend same facilities to a rival line connecting with it at a different point. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Constitutional prohibition against discrimination is not violated by refusing to give to one connecting road same arrangement as to through rates given to another, unless conditions of service are substantially alike. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Railroad company must afford same facilities to one express company as to another at same rate, and must use reasonable diligence to see that one company is not obtaining lower rates than the other. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

Ferriage on railway ferry if furnished to one express company must be furnished to another. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

DIVIDENDS.

Preferred stockholder is not a creditor and is only entitled to dividends out of net earnings. When, however, scrip certificates are issued as dividends convertible into bonds and most of them are recognized, holder may sue thereon, though debts were not paid and net earnings at time of issue were insufficient to pay scrip dividend. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Fact that plaintiff was stockholder did not make him party to act of issuing certificates of scrip so as to prevent his recovery thereon. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

DOMINION OF CANADA.

See CANADA.

EQUITY.

See INJUNCTION; REFORMATION; SPECIFIC PERFORMANCE.

Where plaintiff has remedy at law, bill in equity will not lie against several defendants simply because plaintiff would be obliged at law to sue each for a proportional part of the amount due to him. *Scott v. Erie R. Co.*, xvi. 51.

Exceptions to bill for impertinence not allowed unless it is clear matters excepted to cannot be essential to case. Recent adjudications of courts and facts of which courts take judicial notice may sometimes be properly averred in bill. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Objection to bill that it is not brought in good faith but collusively, goes to jurisdiction of court and should be raised by plea in abatement and not by answer. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

Bill to restrain corporation from employing assets in excess of corporate powers *held*, insufficient on demurrer as too vague. *Leo v. Union Pac. R. Co.*, xvi. 450.

When one of several defendants has filed cross bill and interlocutory decree is entered to protect his rights, complainant cannot dismiss his bill and deprive party filing cross bill of benefit of decree. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

When one defendant pleads to jurisdiction and another answers setting up independent rights and no notice is taken of former plea but decree is entered to protect rights set up in answer, complainant cannot have his bill dismissed for failure to reply to plea, especially when appeal has been taken to which defendant filing plea is not a party. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

When bill is filed to obtain surrender of stocks and bonds fraudulently issued to company defendant, officers of latter are proper parties with view to discovery. *Terhune v. Midland R. R. of N. J.*, xvi. 665.

When several defendants demur separately, appearing by one solicitor and counsel, but one bill of costs will be allowed, but this will embrace special costs in each demurrer. *Terhune v. Midland R. R. of N. J.*, xvi. 665.

ERRORS AND APPEALS.

See APPEALS.

ESTOPPEL.

Under circumstances company was held estopped to show that two delivery orders both issued by it were for same consignment of grain, party having made advances on both. *Coventry & Co. v. Great Eastern R. Co.*, xvi. 292.

Preferred stockholder filing bill to have portion of rental on lease of road applied as dividend on preferred stock, *held*, bound to show first that a certain conveyance of the road was void which he was held estopped to do because of adjudication on point in former suit to which he was a party. *Emerson v. New York & N. E. R. R. Co.*, xvi. 404.

When company issued scrip convertible into bonds as dividend on preferred stock and recognized most of scrip by exchanging it for bonds, company is

ESTOPPEL—Continued.

estopped to refuse to recognize certain of the scrip as valid on ground that when it was issued company was in debt and net earnings were insufficient to pay for scrip. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Company and its agents entering into executed pooling contract are estopped to deny its validity in suit for its infraction. *Nashau & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

When company leases road without express authority, lessee is estopped in action for rent to deny validity of lease. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

Owner of personalty is not estopped to set up his right thereto as against purchaser from ostensible owner when such purchaser had knowledge of true state of title. *Sacalaris v. Eureka & P. R. Co.*, xvi. 580.

EVIDENCE.

See BILL OF LADING; DECLARATIONS; EXPERT.

Declarations made in private by shipper of goods to his clerk as to agreement by him with express company as to carriage are inadmissible in suit against company for loss of goods. *Adams Express Co. v. Boskowitz*, xvi. 102.

In suit against express company for loss of goods, clerk of defendant may be asked whether plaintiff usually put weight on receipts, to contradict a statement to that effect made by clerk of plaintiff. *Adams Express Co. v. Boskowitz*, xvi. 102.

Written contract as to carriage of live-stock containing conditions limiting liability is, in absence of fraud or mistake, sole evidence of agreement, though signed by shipper in a hurry and with previous verbal understanding as to terms of shipment. *St. L., K. C. & N. R. Co. v. Cleary*, xvi. 122.

When bill of lading contained no provision for rebates, prior parol agreement to pay such rebates was not admissible in evidence. *Hopkins v. St. Louis & S. F. R. Co.*, xvi. 126.

Evidence is competent to show that a bill of lading does not embody true contract of transportation and that same lies partly in parol. *Mobile & M. R. Co. v. Jurey*, xvi. 182.

Letters of president admitting liability of company for loss of goods by fire are not admissible in evidence against the company. *Piedmont M'f'g Co. v. Columbia & S. R. Co.*, xvi. 194.

Party may testify why shelled corn is of less value than ear corn for seed, though he states reasons usually given by farmers. *Missouri Pac. R. Co. v. Nevin*, xvi. 252.

Court may properly refuse to permit jury to witness experiments with cars on track outside of court-room, as bearing on question of practicability of alleged collision. *Smith v. St. Paul City R. Co.*, xvi. 810.

In action against sleeping-car company to recover for watch and money stolen during sleep of passenger, evidence that another passenger was robbed the same night in same car was held admissible to show negligence. *Pullman Palace Car Co. v. Gardner*, xvi. 824.

Preponderance of evidence means merely greater weight of evidence and not testimony which is convincing. *Bryan v. Chicago, R. I. & P. R. Co.*, xvi. 335.

When injury was occasioned by washing away of embankment, evidence that it was altered in reconstruction is admissible to show defect in original plan. *Ely v. St. Louis, K. C. & N. R. Co.*, xvi. 842.

Witness who saw lady thrown down by street-car after alighting may state his opinion as to whether she had time to get clear of car before it moved off. *Ward v. Charleston City R. Co.*, xvi. 856.

Stock book containing party's name as stockholder may go in evidence in suit for call to show that he was a subscriber. *Pittsburgh, W. & K. R. R. Co. v. Applegate & Son*, xvi. 440.

Parol evidence is admissible to show that agreement duly executed but never delivered was intended to be a mere form and not binding on parties. *Branson v. Oregonian R. Co.*, xvi. 517.

EVIDENCE—Continued.

Declarations of superintendent as to acceptance or non-acceptance by him of wood furnished to company are admissible in evidence. *Sacalaris v. Eureka & P. R. Co.*, xvi. 580.

Station agent is officer examinable under Rev. Stat. of Ontario, ch. 50, sec. 156, as to matters in question in action brought against company. *Ramsay v. Midland Ry. Co.*, xvi. 594.

Declarations of agent made after conclusion of contract are inadmissible as to alleged misrepresentations in negotiations. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

President and chief engineer may testify that their representations and estimates in entering into construction contract were made bona fide. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Letter held admissible in evidence under circumstances to show position of parties. Receipt of same might be inferred from subsequent conduct and relation of parties. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

EXCESSIVE FREIGHT CHARGES.

See **CARRIERS; DISCRIMINATION.**

EXECUTION.

See **EXEMPTION.**

When judgment was obtained by passenger against railroad for personal injuries and execution was levied on engine, execution will not be enjoined on application of creditors of partnership of which railroad was member where equities are equal and it does not appear that partnership indebtedness existed when property was taken in execution. *Lamoille V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

Validity of sale cannot be passed upon when purchaser is not a party to proceedings. *Lamoille V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

Held to be properly awarded in favor of mechanics' lien claimant against railroad company. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

EXECUTORS.

See **ADMINISTRATORS AND EXECUTORS.**

EXEMPTION.

Exemption laws have no extra-territorial force. In garnishee proceedings it is no defence that debt of garnishee to defendant is by laws of State where both reside exempt from seizure under execution process. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

EXPERT.

Expert evidence is inadmissible that cattle-guard was necessary at certain point. *Amstein v. Gardner*, xvi. 585.

EXPRESS COMPANIES.

Railroad companies are bound to furnish to express companies all usual express facilities. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Court in ordering provisionally railroad company to furnish express facilities at reasonable rates will assume that rates paid in the past were reasonable. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Railroad must afford same facilities to one express company as to another at the same rates, and must use reasonable diligence to see that one company is not obtaining rates lower than the other. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

Ferriage on railway ferry, if not express facility, if furnished to one ex-

EXPRESS COMPANIES—Continued.

press company, must be furnished to another. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 87.

Decree ordering railroad company to carry for express company at reasonable rates, and fixing for time being maximum reasonable rates, is appealable. *St. Louis, I. Mt. & S. Ry. Co. v. Southern Express Co.*, xvi. 95.

Party transmitting money to owner may recover for loss thereof. *Snider v. Adams Express Co.*, xvi. 261.

FARES.

See **PASSENGERS.**

FENCES.

See **ANIMALS.**

Manager of road owned by commonwealth may be sued for injury caused by defect in fence. *Amstein v. Gardner*, xvi. 585.

Expert evidence is not admissible that cattle guard was necessary at certain point. *Amstein v. Gardner*, xvi. 585.

When horse escapes through negligence of owner and runs a long way and then gets on track at unfenced point and is killed at a point still further on, question of contributory negligence is for jury. *Amstein v. Gardner*, xvi. 585.

FERRIES.

See **CARRIERS; EXPRESS COMPANIES.**

FIRE.

Company not held liable owing to special terms of contract for goods in storage destroyed by fire. *Deming v. Norfolk & W. R. Co.*, xvi. 282.

FLOODS.

When injury was occasioned by washing away of embankment, evidence that it was altered in reconstruction is admissible to prove defect in original plan. *Ely v. St. Louis, K. C. & N. R. Co.*, xvi. 842.

FORECLOSURE.

See **MORTGAGE; REORGANIZATION.**

Claim allowed on bonds issued on account of construction contract to extent of benefit actually derived thereunder, though contract is tainted by fraud. *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

FOREIGN CORPORATION.

Process alleging that foreign corporation who was party had authorized agent resident in State, *held*, sufficient to confer jurisdiction when legal service has been made. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Foreign corporation leasing and operating road in State may be garnished for debt due non-resident employee contracted out of the State. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

Foreign construction company cannot maintain bill against foreign railroad company and citizen of State to enforce specific performance of contract to deliver bonds and stock for work done in foreign State and to restrain by injunction negotiation of such bonds, though railroad company has office in State for transfer of shares and has appeared by attorney. *Kansas & E. R. R. C. Co. v. Topeka, S. & W. R. R. Co.*, xvi. 495.

FORFEITURE.

Failure of company to run trains to original terminus is not ground for forfeiture of franchises when discontinuance is caused by act of lessee in adopting another through route and public at large are not injured. *Att'y-Gen'l v. Erie & Kalamazoo R. Co.*, xvi. 652.

FRANCHISES.

Failure of company to run trains to station which is one of original termini held under circumstances not to warrant court in declaring franchises forfeited, the public at large not being injured. *Att'y-Gen'l v. Erie & Kalamazoo R. Co.*, xvi. 652.

FRAUD.

Omission to state value of package is not a fraud, notwithstanding clause in bill of lading limiting liability of carrier. *Adams Express Co. v. Boskowitz*, xvi. 102.

Shipper is bound by fraudulent misrepresentation to carrier as to value of goods shipped. *Graves v. Lake Shore & M. S. R. Co.*, xvi. 108.

Fraudulent misrepresentation by shipper as to value of goods will discharge carrier from liability. But shipper is not bound to disclose contents of trunk shipped by him when not asked. *Texas Express Co. v. Scott*, xvi. 111.

Sale of unclaimed packages by agent of carrier, *held*, tainted by fraud. *Nathan Bros. v. Shivers*, xvi. 276.

Objection to bill on ground that it is not brought in good faith but collusively, should be raised by plea in abatement. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

Fact that officials of rival corporation have given aid in preparing case when bill is filed to annul a lease, will not sustain a charge of collusion and bad faith. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

When station agent is at time of signing of his official bond in default and indebted on pre-existing agency, it is no fraud for the company to fail to notify sureties of fact but it is a fraud for them to hold out agent expressly or impliedly as trustworthy and in such case sureties will be discharged. *Wilmington, etc., R. Co. v. Ling*, xvi. 539.

When two of board of directors take part in contract to construct road and other contractors enter into agreement with other directors which in effect relieves them from liability on their stock, such contract is void at election of parties affected by fraud: *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

Contract of officers to purchase land and locate line and stations on or near such land is contrary to public policy and will not be enforced. But when such lands are bought and sold again and proceeds carried to account of one of parties, others are entitled to appropriate relief. *Cook et al. v. Sherman et al.*, xvi. 561.

In suit for fraud, statute of limitations does not run until fraud is discovered. In action against assignee in bankruptcy he will be chargeable with constructive notice of concealment of fraud by bankrupt, and if fraud was known only to bankrupt and facts were of such character as to conceal themselves, no proof of actual concealment by assignee is necessary. *Cook et al. v. Sherman et al.*, xvi. 561.

When title to real estate is taken in name of one person for benefit of several, with authority to sell and divide proceeds, he occupies fiduciary relation and cannot buy up interests without making full disclosure of facts. *Cook et al. v. Sherman et al.*, xvi. 561.

In such case rule requiring rescission of fraudulent contract immediately on discovery of fraud does not apply. *Cook et al. v. Sherman et al.*, xvi. 561.

Stockholders alone have equity to restrain suit on illegal construction contract in which officers are interested. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

Granting of construction contract to company in which officers were interested held not to be a fraud when stockholders of railroad company had

FRAUD—Continued.

opportunity to become members of construction company. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

When corporations have been consolidated by law, court cannot terminate existence of consolidated company on account of alleged fraud in procuring consolidation. *Terhune v. Midland R. R. of N. J.*, xvi. 665.

FREIGHT.

See **CARRIERS; DISCRIMINATION.**

GARNISHMENT.

In garnishee proceedings it is no defence that debt of garnishee to defendant is by laws of State where both reside exempt from seizure under execution process. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

Foreign corporation leasing and operating road in State may be garnished for debt due non-resident employee contracted outside the State. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

When defendant is at time of service of garnishee process in the garnishee's employ, the proceedings bind only amount due for services to date and not amounts subsequently earned under prior contract of employment. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

HORSE CARS.

See **STREET CARS.**

ICE AND SNOW.

When passenger in street car after signalling to stop stood on slippery platform without catching hold of rail and was knocked off by jolt, *held*, that the question of his contributory negligence was for the jury. *Fleck v. Union R. Co.*, xvi. 872.

ILLEGAL CONTRACTS.

Where parties enter into illegal contracts they cannot invoke legal relief. This rule applies irrespective of the degree of guilt. *Steever v. Illinois Central R. Co.*, xvi. 58.

When two of board of directors take part in contract to construct road and other contractors enter into agreement with other directors which in effect relieves them from liability on their stock, such contract is voidable at election of parties affected by fraud. To extent company is benefited by construction of road under contract same is valid and bonds issued in payment will be sustained. *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

Contract of officers to purchase land and locate line and stations on or near such land is contrary to public policy and will not be enforced. *Cook et al. v. Sherman et al.*, xvi. 561.

When such lands are bought and sold again and proceeds carried to account of one of the parties, others are entitled to appropriate relief. *Cook et al. v. Sherman et al.*, xvi. 561.

Stockholders alone have equity to restrain suit on illegal construction contract in which officers are interested. *Union Pac. R. Co. v. Credit Mobilier*, xxi. 570.

Granting of construction contract to company in which officers were interested held not to be a fraud, when stockholders of railroad company had opportunity to become members of construction company. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

INCORPORATORS.

Original incorporators are not entitled to stock as mere gratuity. They must subscribe for it as other stockholders. *Brown v. Florida Southern R. Co.*, xvi. 463.

Original incorporators cannot divide up land-grant among themselves. *Brown v. Florida Southern R. Co.*, xvi. 463.

INDICTMENT.

See **CRIMINAL LAW.**

INJUNCTION.

Will issue to compel railroads to afford express facilities. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Preliminary injunction in suit to annul lease refused. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

Stockholder may obtain injunction to restrain company from using assets in excess of corporate powers but he must show due diligence to prevent what is sought to be restrained. *Leo v. Union Pac. R. Co.*, xvi. 450.

Stockholder may obtain injunction to restrain ultra vires act, though all the other stockholders assent, but in such case the court will be slow to grant preliminary injunction. *Du Pont v. Northern Pac. R. Co.*, xvi. 456.

When judgment was obtained by passenger against railroad for personal injuries and execution was levied on engine, execution will not be enjoined on application of creditors of partnership of which railroad was member, where equities are equal and it does not clearly appear that partnership indebtedness existed when property was taken in execution. *Lamolle V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

Stockholders alone have equity to restrain suit on illegal construction contract in which officers are interested. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

INSOLVENCY.

Insolvency of party contracting to construct road does not relieve railroad company from liability on contract. Same passes to assignees for benefit of creditors. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

Filing by corporation of certificate that it is nominal organization only for liquidation, being wholly insolvent, is not conclusive upon it as to question whether it can perform its contracts. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

INSURANCE.

Upon payment of total loss by insurer, an equitable assignment of claim against carrier is worked. Suit lies in name of original insurer and real plaintiff need only establish original cause of action. Such real plaintiff is dominus litis, and a plea which does not aver payment to him or to his assignor before he acquired title is bad. *Mobile & M. R. Co. v. Jurey*, xvi. 183.

When party insures goods in transit under policy securing to insurer right of subrogation to claim against carrier in case of loss, and afterwards ships said goods under bill of lading securing to carrier in case of loss benefit of insurance, latter clause is valid and shipper cannot upon loss recover from insurer, having deprived him of his right of subrogation. *Carstairs v. Mechanics & Traders' Ins. Co.*, xvi. 142.

Carrier negligently losing goods may avail himself of clause in bill of lading securing to him benefit of insurance effected by shipper. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

INTEREST.

Wherever damages are capable of exact computation, interest can be recovered. *Arthur v. Chicago, R. I. & P. R. Co.*, xvi. 283.

JUDGMENT.

See **APPEALS.**

JURISDICTION.

See **REMOVAL OF CAUSES; UNITED STATES COURTS.**

Decision of U. S. Circuit Court is usually binding upon co-ordinate tribunals. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Where there are two plaintiffs and two defendants and one of plaintiffs and one of defendants are citizens of same State, United States court has no jurisdiction. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

Foreign construction company cannot maintain bill against foreign railroad company and citizen of State to enforce specific performance of contract to deliver stock and bonds for work done in foreign State and to restrain negotiation of such bonds, though railroad company has office in State for transfer of shares and had appeared by attorney. *Kansas & E. R. R. Co. v. Topeka, S. & W. R. R. Co.*, xvi. 495.

The court declines to decide that Congress may not confer jurisdiction on inferior courts in cases where by constitution Supreme Court of U. S. has original jurisdiction. *Ames v. Kansas ex rel.*, xvi. 522.

Judiciary act of March 3, 1875, does not confer on U. S. circuit courts jurisdiction over cases where jurisdiction of Supreme Court is made exclusive by Sect. 687, Rev. Stat. U. S. *Ames v. Kansas ex rel.*, xvi. 522.

LAND GRANT.

Incorporators are not entitled to divide up land grant among themselves. *Brown v. Florida Southern R. Co.*, xvi. 468.

LEASE.

Fact that officials of rival corporation have been friendly and given aid to complainants in preparation of case where a bill is filed to annul a lease, will not sustain a charge of bad faith and collusion. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

In suit to annul lease, preliminary injunction was under circumstances refused. *Dinsmore v. N. J. Central R. Co.*, xvi. 450.

Lease of road by corporation having no authority to do so is not malum in se nor malum prohibitum, nor is it void as contrary to public policy. Lessee in possession is estopped to deny validity of lease in action for rent. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

When receiver takes possession of leased road, he affirms the lease and becomes liable to pay rent according to its terms. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

Where lessee of road undertakes by way of rent to pay coupons falling due on bonds of lessor, it may be compelled in action by lessor to do so. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

From lessor to lessee held by its terms to cover any claim of lessee against lessor for money paid to take up coupons on lessor's bonds in pursuance of terms of lease. *Stewart et al. v. Hoyt's Exr's*, xvi. 513.

Mechanic's lien for rails filed within six months of delivery of last instalment takes precedence of lease created in interim. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

LICENSE.

Party injured while crossing tracks at point where public had commonly passed for twenty years, held nevertheless guilty of contributory negligence in failing first to look out for train approaching. *Wheelwright v. Boston & Albany R. Co.*, xvi. 815.

LIEN.

See **MECHANICS' LIEN.**

As to the enforcement of carrier's lien for freight by sale of unclaimed packages. *Nathan Bros. v. Shivers*, xvi. 276.

Carrier notified purchaser that he claimed lien on second part of consignment of coal for freight of whole lot. Purchaser took the coal. *Held*, that this did not as matter of law imply a promise by him to pay the carrier the whole freight. *New York & N. E. R. Co. v. Sanders*, xvi. 280.

Contractor has in absence of contract no lien on subscription to stock which company has agreed with subscriber to apply to construction of particular part of road which contractor has undertaken to build. *Myer & Hay v. Dupont et al.*, xvi. 621.

LIMITATION OF LIABILITY.

See **BILL OF LADING; CARRIERS.**

LIMITATIONS.

Action may be brought to recover excessive charge for freight within five years, though prosecution for offence in exacting it is limited to two years. *Heiserman v. Burlington, C. R. & N. R. Co.*, xvi. 46.

In action for delay in carrying goods occurring in part more than six years before suit brought and in part within that time, plaintiff may recover for latter part of delay. *Jones v. Grand Trunk R. Co.*, xvi. 265.

In action against assignee in bankruptcy statute runs only from discovery of fraud. Assignee is chargeable with notice of concealment by assignor and when facts are such as to conceal themselves, no proof of actual concealment by assignee is essential. *Cook et al. v. Sherman et al.*, xvi. 561.

LIVE-STOCK.

See **ANIMALS; CARRIERS.**

LOCATION.

Contract of officers to purchase land and locate line and stations on or near such lands is contrary to public policy and will not be enforced. *Cook et al. v. Sherman et al.*, xvi. 561.

When such lands are bought and sold again and proceeds carried to account of one of parties, others are entitled to appropriate relief. *Cook et al. v. Sherman et al.*, xvi. 561.

MAJORITY.

Controls in corporation as to all matters within corporate powers but not as to matters beyond. *Leo v. Union Pac. R. Co.*, xvi. 450.

MANAGER.

Manager of Troy & Greenfield R. R. & Hoosac Tunnel may be sued for injury to property by defective construction of road by former manager, road being owned by commonwealth. *Amstein v. Gardner*, xvi. 585.

MANDAMUS.

Peremptory writ of mandamus must conform strictly to alternative writ. Hence where the relator is only entitled to part of the relief applied for, final relief cannot be granted as to such part. *State ex rel. v. Kansas City, St. J. & C. B. R. Co.*, xvi. 297.

MASTER AND SERVANT.

See SERVANTS.

MECHANICS' LIENS.

When materials are furnished in car-loads under separate orders, no lien can be filed for car-loads delivered more than ninety days previous, though other car-loads are in mean time delivered. *Heltzell v. Chicago & Alton R. Co.*, xvi. 619.

Materials furnished to contractor for and used by him in construction of railroad are to be regarded as furnished to railroad. *Heltzell v. Chicago & Alton R. Co.*, xvi. 619.

Party contracting to deliver rails may file lien within six months of last delivery. Such lien has priority to trust created in interim and is not affected by agreement that contractor should have lien on rails till payment and that possession of company should be possession of contractor. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

Agreement to give credit to purchaser beyond time within which statutory liens can be enforced does not affect lien when purchaser failed to perform conditions on which credit was given. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

Execution was properly awarded in this case in favor of mechanics' lien claimant against railroad company. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

MORTGAGE.

See FORECLOSURE.

Mechanic's lien for rails filed within six months of delivery of last instalment takes precedence of trust deed executed in interim. *Chicago & Alton R. Co. v. Union Rolling Mill Co.*, xvi. 626.

MUNICIPAL SUBSCRIPTIONS.

When at time municipal subscription is made, tax to pay same is collected by same officer who collects State and county tax, which officer gives one bond, subsequent act authorizing appointment of special officer to collect taxes to pay municipal subscription with separate bond, is invalid as impairing the obligation of a contract. *Edwards v. Williamson*, xvi. 668.

NAMING.

See CORPORATION.

NEGLIGENCE.

See ANIMALS; BAGGAGE; BILL OF LADING; CARRIERS; FENCES; FIRE; PASSENGERS.

When the facts are disputed, the question is for the jury under the directions of the court. When facts are not disputed, the court must give binding instructions. When main fact is proved by defendant's own evidence the question is for the court, even though the evidence is conflicting on collateral points. *Dun v. Seaboard & Roanoke R. Co.*, xvi. 868.

NEGLIGENCE (CONTRIBUTORY).

See BAGGAGE; BILL OF LADING; CARRIERS FIRE; PASSENGERS.

When contributes proximately to injury and bears direct relation to negligent act complained of, will defeat recovery, no matter what the negligence may have been. *McQuilkin v. Central Pac. R. R. Co.*, xvi. 858.

NOTICE.

Proof that notice of call for subscriptions was duly mailed and addressed to subscriber makes prima facie case of notice of such call. *Braddock v. Phila., M. & M. R. R. Co.*, xvi. 486.

OFFICERS.

Letters of president admitting liability of company for loss of goods by fire are not admissible in evidence against company. *Piedmont M'fg Co. v. Columbia & G. R. Co.*, xvi. 194.

Company held bound by act of officers improperly issuing scrip convertible into bonds as dividends on preferred stock, also by representations of officers as to such convertibility. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Upon signing of official bond of station agent, company is not bound to notify sureties of default and existing indebtedness of principal on prior agency, but must not hold him out expressly or impliedly as trustworthy. If they do the sureties are discharged. *Wilmington, etc., R. Co. v. Ling*, xvi. 589.

When company retains station agent who is in default without notifying sureties on his official bond, latter are relieved from all further liability. *Wilmington, etc., R. Co. v. Ling*, xvi. 589.

When two of board of directors take part in contract to construct road and other contractors enter into agreement with other directors which in effect relieves them from liability on their stock, such contract is voidable at election of parties affected by fraud. But to extent company is benefited by construction of road under contract, bonds issued in payment thereof are valid. *Thomas v. Brownville, etc., R. Co.*, xv. 557.

Contract of officers to purchase land and locate line and stations near by is contrary to public policy and will not be enforced. *Cook et al. v. Sherman et al.*, xvi. 561.

Where such lands are bought and sold again, and proceeds carried to account of one of parties, others are entitled to account and other relief. *Cook et al. v. Sherman et al.*, xvi. 561.

Stockholders alone have equity to restrain suit by construction company upon contract obtained by procurement of directors who are themselves interested in the contract. Creditors and government granting charter have no such equity. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

Giving of construction contract to company in which officers were interested held not to be a fraud where stockholders of railroad company had opportunity to become members of construction company. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

Superintendent of railroad company has right to accept or refuse wood furnished to company. Declarations made by him in transaction are admissible in evidence. *Sacalaris v. Eureka & P. R. R. Co.*, xv. 580.

Manager of railroad owned by commonwealth may be sued for injury to property by defective construction of road by former manager. *Amstein v. Gardner*, xvi. 585.

Directors may pass by-law fixing salary of solicitor. Shareholders cannot undo arrangement in respect of past services. *Falkiner v. Grand Junction R. Co.*, xvi. 591.

Station agent is officer examinable under Rev. Stat. of Ontario, ch. 50, sect. 156, as to matters in question in action brought against company. *Ramsay v. Midland Ry. Co.*, xvi. 594.

Representations of president as to capacity of chief engineer of company made to other contractors but not communicated to those agreeing to build road, are inadmissible when offered by latter. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

President and chief engineer may testify that their representations and estimates in entering into construction contract were bona fide. *Phelps & Co. v. George's Creek & C. R. Co.*, xvi. 600.

Contract recited to be subscribed by proper officers and signed by president of one company and director of another, and properly sealed, is prima facie so executed as to be binding. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

When bill is filed to obtain surrender of stocks and bonds fraudulently issued to company defendant, directors of latter are proper parties with view to discovery. *Terhune v. Midland R. R. of N. J.*, xvi. 665.

OFFICIAL BONDS.

See BONDS.

ORGANIZATION.

Acknowledgment of articles of incorporation need not show that persons acknowledging were personally known to officer to be the same executing the articles. *People ex rel. v. Cheeseman et al.*, xvi. 400.

Substantial compliance with requisites of general law is necessary to organization of corporation. *People ex rel. v. Cheeseman et al.*, xvi. 400.

Company organized to build union depot and branch roads to it to accommodate different railroad companies, need not organize strictly as required by law in the case of railroad companies. *People ex rel. v. Cheeseman et al.*, xvi. 400.

When statute provides that corporation shall not exist more than twenty years and articles of incorporation provide for fifty years' existence, corporation may exist for twenty years. *People ex rel. v. Cheeseman et al.*, xvi. 400.

PARTNERSHIP.

Agreement between connecting lines as to through freights, each being responsible only by terms of bill of lading for his own acts or omissions, does not render them partners and liable for each others acts and omissions. *Deming v. Norfolk & W. R. Co.*, xvi. 282.

Where judgment was obtained by passenger against railroad for personal injuries and execution was levied on engine, execution will not be enjoined on application of creditors of partnership of which railroad was member where equities are equal and it does not clearly appear that partnership indebtedness existed when property was taken in execution. *Lamoille V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

Priority of partnership creditors exists in equity and not at law. *Lamoille V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

PASSENGERS.

See BAGGAGE; TICKETS.

LIABILITY OF CROWN.

Crown is not liable for injury to passenger travelling on railway owned and operated by Dominion of Canada. *Queen v. McLeod*, xvi. 801.

DUTY OF COMPANY.

When passenger on street car is injured by collision with another car, prima facie presumption of negligence on part of company arises. *Smith v. St. Paul City R. Co.*, xvi. 810.

Street-car companies are bound to highest degree of care for safety of passengers. *Smith v. St. Paul City R. Co.*, xvi. 810.

Person who has hailed street car and is carefully and prudently attempting to get on platform is passenger and company is liable to him as such. *Smith v. St. Paul City R. Co.*, xvi. 810.

Where car is stopped at unsafe place to alight, company must either give passenger assistance in alighting or move the car to a safe place. Whether servants were negligent in this regard was for the jury in this case. *Cartwright v. Chicago & G. T. R. Co.*, xvi. 821.

In action for injury to passenger where petition alleged that accident was caused by running train at point weakened by flood, no recovery can be had for accident caused by defects in road-bed or in ties. *Ely v. St. Louis, K. C. & N. R. Co.*, xvi. 842.

Where injury was occasioned by washing away of embankment, evidence that it was altered in reconstruction is admissible to prove defect in original plan. *Ely v. St. Louis, K. C. & N. R. Co.*, xvi. 842.

PASSENGERS—Continued.**CONTRIBUTORY NEGLIGENCE.**

Person intending to take train, injured at station while crossing tracks, as public had done for twenty years, by train run contrary to rules of company of which party knew, *held*, under circumstances guilty of contributory negligence in failing to look out for approaching train. *Wheelwright v. Boston & Albany R. Co.*, xvi. 815.

Where car is stopped at night, it is question for jury whether it is contributory negligence for woman to get off in the dark from rear platform, rather than pass through smoking car and get off where there is a light. Such conduct is not contributory negligence per se. *Cartwright v. Chicago & G. T. R. Co.*, xvi. 821.

When evidence showed that plaintiff, who was injured in alighting from street car, had not time to alight, it is not error to refuse to give instructions as to verdict in case he had time. *Knowlton v. Milwaukee City R. Co.*, xvi. 830.

Brakeman called out station and train stopped in dark. Plaintiff got up to get off and attempted to do so after train started without perceiving it. There was no warning that the train had started. *Held*, that the question of plaintiff's contributory negligence was for jury. *Brooks v. Boston & Maine R. Co.*, xvi. 845.

When station was announced and train slowed up but did not stop, and plaintiff jumped and was injured, *held*, the question of her contributory negligence was for the jury. *Edgar et ux v. Northern R. Co.*, xvi. 847.

It is negligence per se for a passenger to attempt to alight from cars on opposite side from that where company has provided platform. *McQuilkin v. Central Pac. R. R. Co.*, xvi. 858.

Witness who saw lady thrown down by street car after alighting may state his opinion as to whether she had time to get clear of car before it moved off. *Ward v. Charleston City R. Co.*, xvi. 856.

When passenger rests arm on window-sill wholly within car and by sudden collision arm is thrown out and broken, question of contributory negligence is for jury. *Germantown Pass. R. Co. v. Brophy*, xvi. 861.

When passenger sat with elbow out of window and same was struck by cord wood piled near track, *held*, that he was guilty of such contributory negligence as precluded recovery. *Dun v. Seaboard & Roanoke R. Co.*, xvi. 868.

Passenger in street car after signalling to stop, left his seat and stood on rear platform which was slippery with ice and snow, and omitted to take hold of rail. The car jolted. He was thrown off and injured. *Held*, the question of his contributory negligence was for the jury. *Fleck v. Union R. Co.*, xvi. 872.

FARES AND TICKETS

When coupon ticket contains clause that coupons shall be void if detached, passenger cannot tender detached coupons. But if conductor sees ticket and could readily ascertain by inspection that coupon had been detached therefrom, he is bound to receive it. *Louisville, N. & Gt. S. R. Co. v. Harris*, xvi. 874.

When coupon ticket contains clause that coupons shall be void if detached, and passenger tenders detached coupon only, he may be expelled from the train. *Louisville N. & Gt. S. R. Co. v. Harris*, xvi. 874.

When passenger holds continuous ticket he cannot stop off and transfer the ticket to another party for the balance of the journey. *Walker v. Wabash, etc., R. Co.*, xvi. 880.

Party in street car who is familiar with practice, receiving by mistake of conductor wrong transfer check, is not entitled to ride thereon in connecting car and on refusing to pay fare may be expelled. *Bradshaw v. South Boston R. Co.*, xvi. 886.

EXPULSION.

Passenger while being lawfully ejected for non-payment of fare cannot regain his right to passage by tendering fare in rude and boisterous manner. *Louisville, N. & Gt. S. R. Co. v. Harris*, xvi. 874.

PASSENGERS—Continued.

Only in case of wilful violation of contract will rule be applied that passenger while being put off for non-payment of fare cannot acquire right of passage by tendering same. *Louisville, N. & Gt. S. R. Co. v. Harris*, xvi. 874.

When passenger is expelled for non-payment of fare before he has time to borrow amount from fellow-passenger, he cannot recover exemplary damages in the absence of malice on conductor's part in ejecting him. *Curl v. Chicago, R. I. & P. R. Co.*, xvi. 879.

Where drunken passenger is put off for non-payment of fare, the company is bound to eject him in such place as will not, on account of his condition, endanger his life and health. *Louisville, C. & St. L. R. Co. v. Sullivan*, xvi. 890.

ASSAULTS BY SERVANTS.

May recover for insolence and abuse of servants. If there is any justification, the burden is on the company to prove it. *Bryan v. Chicago, R. I. & P. R. Co.*, xvi. 885.

Company is liable for unwarrantable assaults by servants on passengers. *International & Gt. Northern R. Co. v. Kentle*, xvi. 887.

SUNDAY LAWS.

Where passenger is injured while travelling for pleasure in street car on Sunday he may recover. *Knowlton v. Milwaukee City R. Co.*, xvi. 880.

DAMAGES.

When jury report in special findings damage to passenger from sudden starting of train to be \$800, a general verdict of \$700 will be set aside, if plaintiff is not entitled to exemplary damages. *Atchison, T. & S. F. R. Co. v. Harvey*, xvi. 852.

PASSENGER'S BAGGAGE.

Sleeping-car companies must use reasonable diligence to guard clothes and valuables of sleeping passengers. In action for loss of watch and money, where porter on watch had left guard for short time, question of negligence was for jury. Evidence was admissible that another passenger had watch stolen same night in same car. *Pullman Palace Car Co. v. Gardner*, xvi. 824.

Passenger by accident dropped valuable parcel out of open window. Conductor, though asked, refused to stop train until next station was reached. The parcel was never found. *Held* that the company was not liable. *Henderson v. Louisville, etc., R. Co.*, xvi. 897.

PRACTICE.

Execution issued by passenger on judgment for personal injuries will not be enjoined on application of creditors of partnership of which company defendant is a member. *Lamoille V. R. R. Co. et al. v. Bixby & M. & St. J. R. R. Co.*, xvi. 474.

PENALTIES.

May be imposed to prevent excessive freight charges and discriminations as to railroads wholly within the State, but not as to those without. *Louisville & N. R. Co. v. Railroad Com.*, xvi. 1.

Law imposing penalties on railroad companies for unjust discrimination and excessive charges is void as an unfair discrimination against railroad companies. *Louisville & N. R. Co. v. Railroad Com.*, xvi. 1.

State act fixing maximum rates for transportation of freight and passengers is unconstitutional as regulation of inter-State commerce so far as it relates to shipments on inter-State lines. *Kaiser v. Illinois Central R. Co.*, xvi. 40.

PETITION OF RIGHT.

Crown cannot be made liable in proceeding in nature of petition of right for injury to passengers on railways owned and operated by Dominion of Canada. *Queen v. McLeod*, xvi. 801.

PLEADING.

See **CARRIERS; PRACTICE.**

As to particularity necessary in statements of complaint. *Ayres et al. v. Chicago & N. W. R. Co.*, xvi. 171; *Richardson v. Chicago & N. W. R. Co.*, xvi. 172.

Answer may contain different inconsistent pleas, but each plea must be consistent with itself. *International & Gt. Northern R. Co. v. Kentle*, xvi. 887.

It is error to strike special defences out of pleadings, though evidence as to them is admitted under general denial. *International & Gt. Northern R. Co. v. Kentle*, xvi. 887.

Objection that company sued is not corporation should be taken by answer and not by demurrer. *Stanly v. Richmond & D. R. Co.*, xvi. 545.

PRACTICE.

See **AMENDMENT; APPEALS; COSTS; DAMAGES; EQUITY; EVIDENCE; GARNISHMENT; INTEREST; JURISDICTION; PLEADING; REMOVAL OF CAUSES; SERVICE OF PROCESS; UNITED STATES COURTS; VENUE.**

Trial will not be continued because party fails to obey subpoena duces tecum, when same was not served until day before trial. Matters of this sort are largely within discretion of trial court. *Texas Express Co. v. Scott*, xvi. 111.

Instruction submitting question of law to court sitting as jury is properly refused. *St. Louis, K. C. & N. R. Co. v. Cleary*, xvi. 122.

Instruction which is under pleadings and evidence a mere abstraction is properly refused. *St. Louis, K. C. & N. R. Co. v. Cleary*, xvi. 122.

Charge to jury should be in reference to tendencies of testimony and should be construed in light thereof. *South & North Ala. R. Co. v. Wood*, xvi. 287.

Court cannot require the jury to determine the issue from the pleadings. *Bryan v. Chicago, R. I. & P. R. Co.*, xvi. 835.

It is fatal error to submit to the jury a question not raised by pleadings. *Ely v. St. Louis, K. C. & N. R. Co.*, xvi. 842.

In this case the answers to special questions were held so evasive and unsatisfactory as to warrant belief that the railroad company had not had fair trial and therefore to warrant reversal. *Atchison, T. & S. F. R. Co. v. Harvey*, xvi. 852.

Plaintiff announced that he had no challenges to make. Defendant then challenged two jurors. Plaintiff could not afterwards demand a right of challenge. *Ward v. Charleston City R. Co.*, xvi. 356.

Allegations by trustee presenting for trial same issues raised and tried between principal parties will be dismissed on motion. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Court had power in this case to authorize action to determine rights of parties, instead of determining them upon a motion. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

Jury must determine all disputed questions of fact. *Sacalaris v. Eureka & P. R. Co.*, xvi. 580.

PREFERRED STOCK.

Preferred stockholder seeking to have conveyance of road set aside, *held*, estopped by adjudication on point in former suit to which he was a party. *Emerson v. New York & N. E. R. R. Co.*, xvi. 404.

Preferred stockholder is not a creditor and is not entitled to guaranteed

PREFERRED STOCK—Continued.

dividend until debts are paid and then only out of net earnings applicable to dividend. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Holder of certificates of scrip issued by company as dividend on preferred stock and convertible into bonds may maintain suit thereon where nearly all the other certificates issued have been recognized and converted into bonds, and this though company was in debt when scrip dividends were issued, and net earnings were insufficient to pay them. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Fact that plaintiff was stockholder did not make him so far party to issue of scrip as to prevent his recovery thereon. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

The certificates ran to holder, went on market and were purchased by plaintiff. He was always treated as original holder, and certificates as running to bearer. *Held*, he could sustain action thereon in his own name. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

The acts of directors recognizing validity of corporate action in issuing scrip and authorizing issue of bonds to take it up. *Held*, a ratification of its validity. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Last issue of the scrip certificates did not recite convertibility; but officers at time of issue assured plaintiff they were convertible into bonds. *Held*, that they should be treated same as other certificates. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

PRINCIPAL AND SURETY.

See BONDS.

POOLING CONTRACT.

Pooling agent is trustee and is accountable as such in court of equity. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

When pooling contract is once executed, corporation entering into it is estopped to deny validity of contract in defence of an action for its infraction brought by the other party. Still less can agents of party set up such defence. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

QUO WARRANTO.

Information in nature of quo warranto is in effect a civil proceeding. *Ames v. Kansas ex rel.*, xvi. 522.

Where statute abolishes information in nature of quo warranto and substitutes action to same effect, cause may be removed to U. S. courts when other circumstances warrant removal. *Ames v. Kansas ex rel.*, xvi. 522.

Suit by State against one of its corporations for relinquishing powers to another corporation with which it has been consolidated under laws of U. S., and proceedings against directors of consolidated company for usurping powers of State corporation, are suits arising under laws of U. S. and may be removed to U. S. courts. *Ames v. Kansas ex rel.*, xvi. 522.

Before entering judgment of ouster, regard will be had to honor of State. *Attorney-Gen'l v. Joy*, xvi. 648.

Judgment of ouster will not be entered on ground that original act authorizing change of name and purchase of property and franchises of another company was void because not passed by constitutional majority, when long time has elapsed, acts have been done on faith of validity of original statute and divers other statutes have been passed recognizing validity of statute above named. *Attorney-Gen'l v. Joy*, xvi. 648.

Failure of company to run trains to terminus fixed in original charter is not ground for forfeiture of franchises when discontinuance is caused by act of lessee in adopting another through route and public at large are not injured. *Att'y-Gen'l v. Erie & Kalamazoo R. Co.*, xvi. 652.

RAILROAD COMMISSIONS.

See COMMISSIONS; CONSTITUTIONAL LAW.

RECEIVERS.

Where parties have not appealed from orders appointing receiver and defining powers, they cannot dispute or question powers. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

Court may direct how property shall be managed while in hands of receiver. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

Liabilities created by receivership must be fully paid before any other claims can be made against the property. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

By taking possession of leased road affirms the lease and incurs liability to pay rent according to its terms. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

RECORDS.

Stock book containing party's name as stockholder may go in evidence in suit for call to show that he was a subscriber. *Pittsburgh, W. & K R R. Co v. Applegate & Son*, xvi. 440.

REFORMATION.

Contract will not be reformed when preponderance of evidence is with party contesting reformation. *Hutchinson et al. v. New Sharon, E. V & E. R. Co.*, xvi. 617.

RELEASE.

From lessor to lessee held by its terms to cover any claim of lessee against lessor for money paid to take up coupons on lessor's bonds in pursuance of terms of lease. *Stewart et al. v. Hoyt's Exr's*, xvi. 518.

REMOVAL OF CAUSES.

See JURISDICTION; UNITED STATES COURTS.

Where there are two plaintiffs and two defendants and one of plaintiffs and one of defendants are citizens of same State, case cannot be removed to United States courts. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

When cause is once removed to United States court, no change of pleadings or in relationship of parties by amendment can confer jurisdiction not disclosed by original proceedings in State court. *Walser et al. v. Memphis, C. & N W R. Co.*, xvi. 449.

Bill was filed by stockholders to set aside lease as void. Defendants moved to remove to U. S. court on ground that lease was authorized by State statute which complainants averred to be in violation of original charter contract. *Held*, that as contention was not raised by pleadings, mere possibility that it might arise did not warrant removal. *Mills et al. v. Central R. R. of N. J.*, xvi. 491.

When main controversy is between citizens of same State and there is no controversy wholly between citizens of different States which can be fully determined between them, cause cannot be removed to United States court. *Mills et al. v. Central R. R. of N. J.*, xvi. 491.

When statute abolishes quo warranto proceedings and substitutes action to same effect, such action may be removed to U. S. circuit court when other circumstances warrant removal. *Ames v. Kansas ex rel.*, xvi. 522.

Suit by State against one of its corporations for relinquishing powers to another corporation with which it has become consolidated under laws of U. S., and proceedings against directors of consolidated company for usurping powers of State corporation are suits arising under U. S. laws, and may be removed to U. S. Court. *Ames v. Kansas ex rel.*, xvi. 522.

The court declines to decide that Congress may not confer on inferior courts jurisdiction in cases where by constitution Supreme Court of the United States has original jurisdiction. *Ames v. Kansas ex rel.*, xvi. 522.

Suits cognizable in U. S. courts on account of nature of controversy, and not required to be brought originally in U. S. Supreme Court may be removed to U. S. Circuit Courts irrespective of character of parties. *Ames v. Kansas ex rel.*, xvi. 522.

REORGANIZATION.

Act enabling creditors to buy in at foreclosure sale and reorganize is not obnoxious because it creates new corporation with old chartered powers. *Attorney-General v. Joy*, xvi. 642.

RESCISSION.

Stockholder cannot have ultra vires transactions of directors set aside unless he held his interest at time of transactions complained of nor unless he has exhausted his legal remedies. *Dimpfel v. Ohio & M. R. Co.*, xvi. 461.

When trustee by misrepresenting material facts obtains conveyance of subjects of trust for inadequate consideration, rule requiring rescission of contract immediately upon discovery of fraud does not apply. *Cook et al. v. Sherman et al.*, xvi. 561.

Contract can only be rescinded by acts or assent of both parties. It is not rescinded by insolvency of one of parties. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

SALARY.

Directors may employ solicitor and fix his salary. Shareholders cannot undo arrangement in respect of past services. *Falkiner v. Grand Junction R. Co.*, xvi. 591.

SALE.

Statutory duty of agent of carrier proceeding to sell unclaimed packages. The sale in this case held tainted by fraud. *Nathan Bros. v. Shivers*, xvi. 276.

Property purchased from private railroad corporation in good faith is not affected with trust in hands of purchaser for unpaid debts of corporation, though purchaser had notice of their existence. *Branson v. Oregonian Ry. Co.* xvi. 517.

Owner of personalty is not estopped to set up his right thereto as against purchaser from ostensible owner when purchaser knew who really had title. *Sacalis v. Eureka & P. R. Co.*, xvi. 580.

SCRIP.

Company issuing scrip convertible into bonds as dividend on preferred stock, and recognizing greater part of said scrip as valid by issuing bonds to take up same, is estopped to deny validity of rest of scrip though it was in debt when scrip was issued and net earnings were insufficient to pay same. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Fact that plaintiff was stockholder did not make him party to issue of scrip so as to defeat recovery thereon. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Ran to holder and went into market where it was bought up by plaintiff. Company always recognized him as original holder and considered certificates as running to bearer. *Held*, that he could sue thereon in his own name. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

When certificates of scrip did not contain recitals of convertibility into bonds, company was held bound by representations of officers at time of issue that such was the case. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

SEAL.

Contract reciting that seal is properly annexed accompanied with evidence tending to show that same is affixed by competent authority, is valid and binding. *New England Iron Co. v. Gilbert Elevated R. Co.*, xvi. 609.

SERVANTS.

See AGENCY AND AGENTS.

When baggage agent accepts articles as baggage which are not so in fact, company is liable for them as baggage. *Texas, etc., R. Co. v. Capps*, xvi. 118, *Chicago, R. I. & P. R. Co. v. Conklin*, xvi. 116.

Company is bound by act of baggage master in checking baggage over wrong system of connecting lines. *Isaacson v. N. Y. Central & H. R. R. Co.*, xvi. 188.

Passenger may recover from company for insolence and abuse by servants. If there is justification company must prove it. *Bryan v. Chicago, R. I. & P. R. Co.*, xvi. 335.

Company is liable for unwarrantable assaults by servants on passengers. *International & Gr. Northern R. Co. v. Kentle*, xvi. 337.

Company may be garnished for sum due non-resident employee, though debt was contracted out of the State. Such proceedings bind only sum due to date of service of process. *Burlington & M. R. R. Co. v. Thompson*, xvi. 480.

SERVICE OF PROCESS.

Allegation in process that foreign corporation which was party had authorized agent resident in State is enough to give court jurisdiction when legal service has been made. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Truth of officer's return of service cannot be questioned. Remedy is by action for a false return. *Ex parte St. Louis, I. Mt. & S. R. Co.*, xvi. 547.

May be made upon station agent or other person having control of company's business, or upon clerk or agent of any station in county. *Ex parte St. Louis, I. Mt. & S. R. Co.*, xvi. 547.

Defendant in action upon whom process has been served illegally may appear specially to have same set aside. *Lung Chung, Adm'r, v. Northern Pac. Ry. Co.*, xvi. 548.

Act as to service of process in Oregon when applied in U. S. courts must be construed as if word "county" read "district." *Lung Chung, Adm'r, v. Northern Pac. Ry. Co.*, xvi. 548.

In Oregon where process is served on any agent other than president, secretary, cashier or managing agent, the same is void and service will be set aside unless it appears that the cause of action arose in the county or district. *Lung Chung, Adm'r, v. Northern Pac. Ry. Co.*, xvi. 548.

Process cannot be served on agent of company travelling in State on company's business, when company's line was not in State, and it had no office in State. *Chicago & Alton R. Co. v. Walker*, xvi. 558.

In absence of statutory provision, service of process on secretary of railroad company is sufficient. *Heltzell v. Chicago & Alton R. Co.*, xvi. 619.

SLEEPING CARS.

Sleeping-car companies must use reasonable diligence to guard clothes and valuables of sleeping passengers. In action for loss of watch and money where porter on watch had left guard for short time, question of negligence was for jury. Evidence was admissible that another passenger had watch stolen same night in same car. *Pullman Palace Car Co. v. Gardner*, xvi. 324.

SNOW.

See ICE AND SNOW.

SPECIFIC PERFORMANCE.

One placing means to pay debt in hands of another on his covenant to pay same, may maintain action in equity to compel performance of covenant without first paying debt. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

STATE.

Manager of railroad owned by commonwealth may be sued for injury to property by defective construction of road by former manager. *Amstein v. Gardner*, xvi. 585.

STATIONS.

Company is not bound to construct or maintain stations at points where its line is intersected by another line. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, xvi. 57.

Kansas City, St. J. & C. B. R. Co. need not make Savannah station on main track. It may run switch to old depot in that place, and must run one train a day over said switch. *State ex rel. v. Kansas City, St. J. & C. B. R. Co.*, xvi. 297.

Person injured at station while crossing track as public commonly did, by train run contrary to the rules of the company of which party was cognizant, *held*, guilty of contributory negligence in failing to look out. *Wheelwright v. Boston & Albany R. Co.*, xvi. 815.

Failure of company to run trains to station which is one of original termini held under circumstances not to warrant court in declaring franchises forfeited, the public at large not being injured. *Att'y-Gen'l v. Erie & Kalamazoo R. Co.*, xvi. 652.

STATUTE.

Act approving change of corporate name not obnoxious as private charter nor as conferring special privileges. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Corporation will not be ousted of franchises because original act of incorporation does not appear to have been passed by constitutional majority, when there has been great lapse of time and confirmatory legislation. *Attorney-General v. Joy*, xvi. 648.

An act enabling company incorporated under special act to change name and extend road is not obnoxious as an act renewing or extending special act of incorporation. *Attorney-General v. Joy*, xvi. 648.

Act will not be declared invalid after lapse of thirty years because title embraces two objects. *Attorney-General v. Joy*, xvi. 648.

Act repealing portions of general railway law does not apply in cases where there is special act of incorporation. *Attorney-General v. Joy*, xvi. 648.

STOCK.

See CORPORATION; STOCKHOLDER; SUBSCRIPTION.

STOCKHOLDERS.

See PREFERRED STOCK; SUBSCRIPTION.

Suit will not lie on subscription to stock without previous call by directors. *Braddock v. Phila., M. & M. R. R. Co.*, xvi. 486.

Proof that notice of call for subscriptions was duly mailed and addressed to subscriber makes prima facie case of notice of such call. *Braddock v. Phila., M. & M. R. R. Co.*, xvi. 486.

Where person's name appears on stock book as stockholder, presumption is that he is owner of stock standing in his name, and book may go in evidence in suit for call to show that he was a subscriber. *Pittsburgh, W. & K. R. R. Co. v. Applegate & Son*, xvi. 440.

Corporation is necessary party to bill to enforce judgment against it by compelling contribution from stockholders. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

May enjoin company from using assets in excess of corporate powers, but

STOCKHOLDERS—Continued.

must show due diligence to prevent what is sought to be restrained. *Leo v. Union Pac. R. Co.*, xvi. 450.

May obtain injunction to restrain ultra vires act though all the other stockholders assent, but in such case the court will be slow to grant preliminary injunction. *Du Pont v. Northern Pac. R. Co.*, xvi. 456.

Cannot set aside transactions of directors unless he held his interest at time of transactions complained of nor unless he has exhausted his legal remedies. *Dimpfel v. Ohio & M. R. Co.*, xvi. 461.

Original incorporator is not entitled to stock as a mere gratuity. He must subscribe for it and be liable on his subscription as other stockholders. *Brown v. Florida Southern R. Co.*, xvi. 463.

When two of board of directors take part in construction contract and other contractors enter into agreement with other directors which in effect relieves them from liability on their stock, the contract is voidable at election of parties affected by fraud. *Thomas v. Brownville, etc., R. Co.*, xvi. 557.

Have alone equity to restrain suit by construction company upon contract obtained by procurement of directors who are themselves interested in the construction company. Creditors and government granting charter have no such equity. *Union Pac. R. Co. v. Credit Mobilier*, xvi. 570.

STREET CARS.

Are bound to highest degree of care for safety of passengers. *Smith v. St. Paul City R. Co.*, xvi. 810.

When passenger on street car is injured by collision with another car, prima facie presumption of negligence on part of company arises. *Smith v. St. Paul City R. Co.*, xvi. 810.

Person who has hailed street car and is carefully and prudently attempting to get on platform is passenger, and company is liable to him as such. *Smith v. St. Paul City R. Co.*, xvi. 810.

Passenger injured while travelling for pleasure on Sunday in street car may recover. *Knowlton v. Milwaukee City R. Co.*, xvi. 830.

When evidence showed plaintiff who was injured in alighting from street car had not time to alight, it is not error to refuse to give instructions as to verdict in case he had time. *Knowlton v. Milwaukee City R. Co.*, xvi. 830.

Witness who saw lady thrown down by street car after alighting may state his opinion as to whether she had time to get clear of car before it moved off. *Ward v. Charleston City R. Co.*, xvi. 856.

When passenger rests arm on window-sill wholly within car and by sudden collision arm is thrown out and broken, question of contributory negligence is for jury. *Germantown Pass. R. Co. v. Brophy*, xvi. 861.

Passenger in street car after signalling to stop, left his seat and stood on rear platform which was slippery with ice and snow and omitting to take hold of rail was knocked off and injured. *Held* that the question of his contributory negligence was for jury. *Fleck v. Union R. Co.*, xvi. 872.

Party in street car who is familiar with practice receiving by mistake of conductor wrong transfer check is not entitled to ride thereon in connecting car and on refusing to pay fare may be expelled. *Bradshaw v. South Boston R. Co.*, xvi. 886.

SUBROGATION.

When party insures goods in transit under policy securing to insurer right of subrogation to claim against carrier in case of loss, and afterwards ships the goods under bill of lading securing to carrier in case of loss benefit of insurance, latter clause is valid and shipper cannot upon loss recover from insurer, having deprived him of his right of subrogation. *Carstairs v. Mechanics & Traders' Ins. Co.*, xvi. 142.

Carrier negligently losing goods may avail himself of clause in bill of lading securing to him right of subrogation against insurer. *Rintoul v. N. Y. Central & H. R. R. Co.*, xvi. 144.

SUBSCRIPTION.**See STOCKHOLDERS.**

Suit will not lie on subscription to stock without previous call by directors. *Braddock v. Phila., M. & M. R. R. Co.*, xvi. 486.

Fact that certain of promoters guaranteed that line should pass near subscriber's land and that it was not so built, will not discharge subscriber, there being no evidence of fraudulent intent. *Braddock v. Phila., M. & M. R. R. Co.*, xvi. 486.

Subscriber cannot escape liability on ground that he failed to pay sum required by statute at time of subscription. *Pittsburgh, W. & K. R. R. Co. v. Applegate & Son*, xvi. 440.

Contractor has in absence of contract no lien on subscription to stock which company has agreed with subscriber to apply to construction of particular part of road where contractor is at work. *Myer & Hay v. Dupont et al.*, xvi. 621.

There is no trust for such contractor except as to amount of such subscription remaining in hands of company after construction of part of road to which subscription was to be applied. *Myer & Hay v. Dupont et al.*, xvi. 621.

SUNDAY.

Passenger injured while travelling for pleasure in street car on Sunday may recover. *Knowlton v. Milwaukee City R. Co.*, xvi. 880.

TICKETS.**See PASSENGERS.**

When coupon ticket contains clause that coupons shall be void if detached, passenger cannot tender detached coupon. But if conductor sees ticket and could readily ascertain by inspection that coupon had been detached therefrom, he is bound to receive it. *Louisville, N. & Gt. S. R. Co. v. Harris*, xvi. 874.

When passenger holds continuous ticket he cannot stop off and transfer the ticket to another party for balance of the journey. *Walker v. Wabash, etc., R. Co.*, xvi. 880.

Party in street car who is familiar with practice receiving by mistake of conductor wrong transfer check, is not entitled to ride thereon in connecting line and on refusing to pay fare may be expelled. *Bradshaw v. South Boston R. Co.*, xvi. 886.

TRUSTEE PROCESS.**See GARNISHMENT.****TRUSTS AND TRUSTEES.**

Party transmitting money to owner by express is trustee of express trust and may recover for loss. *Snider v. Adams Express Co.*, xvi. 261.

Allegations by trustee presenting for trial same issues raised and tried between principal parties will be dismissed on motion. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Pooling agent is trustee and accountable as such in court of equity. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

Plaintiff may join as defendants all parties into whose hands trust funds can be traced. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

When purchaser buys in good faith all property of private railroad company, same is not affected with trust in his hands for creditors of corporation, though he had notice of existence of debt. *Branson v. Oregonian Ry. Co.*, xvi. 517.

When title to real estate is taken by several parties in name of one, with authority to sell and divide proceeds, he occupies fiduciary relation and cannot buy up interests without full disclosure of facts. *Cook et al. v. Sherman et al.*, xvi. 561.

In such case rule requiring rescission of fraudulent contract immediately on discovery of fraud does not apply. *Cook et al. v. Sherman et al.*, xvi. 561.

TRUSTS AND TRUSTEES—Continued.

When company agrees with subscriber to stock to apply his subscription to construction of certain part of road, there is no trust for the contractor building such part of road except as to amount of subscription in hands of company after building of part of road to which subscription was to be applied. *Myer & Hay v. Dupont et al.*, xvi. 621.

ULTRA VIRES.

Company held bound by improper issue of scrip convertible into bonds as dividend on preferred stock, where it had recognized validity of greater part of scrip and issued bonds to take it up. *Chaffee v. Rutland R. R. Co.*, xvi. 408.

Bill to restrain corporation from employing assets in excess of corporate powers *held* insufficient on demurrer as too vague. *Leo v. Union Pacific R. Co.*, xvi. 450.

Stockholder may have injunction to restrain company from using assets in excess of corporate powers, but he must show due diligence to prevent what is sought to be restrained. *Leo v. Union Pacific R. Co.*, xvi. 450.

Stockholder may obtain injunction to restrain ultra vires act, though all the other stockholders assent, but in such case the court will be slow to grant preliminary injunction. *Du Pont v. Northern Pac. R. Co.*, xvi. 456.

Stockholder cannot have ultra vires transactions of directors set aside unless he held his interest at time of transactions complained of nor unless he has exhausted his legal remedies. *Dimpfel v. Ohio & M. Co.*, xvi. 461.

Company entering into pooling contract is estopped to deny its validity in suit by other party to recover damages for its infraction. *Nashua & L. R. Co. v. Boston & L. R. Co.*, xvi. 488.

When company leases road without express authority, lessee is estopped to deny validity of lease in action for rent. *Woodruff v. Erie R. Co. et al.*, xvi. 501.

UNITED STATES COURTS.**See JURISDICTION; REMOVAL OF CAUSES.**

Decision of U. S. Circuit Court is usually binding upon co-ordinate tribunals. *Wells, Fargo & Co. v. Oregon R. & N. Co.*, xvi. 71.

Where there are two plaintiffs and two defendants and one of plaintiffs and one of defendants are citizens of same State, case cannot be removed to United States Court. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

When cause is once removed to United States Court, no amendment can confer jurisdiction not disclosed by original proceedings in State Court. *Walser et al. v. Memphis, C. & N. W. R. Co.*, xvi. 449.

Bill was filed by stockholders to set lease aside as void. Defendants moved to remove to U. S. court on ground that lease was authorized by State statute which complainants averred to be in violation of charter contract. *Held*, that as contention was not raised by pleadings, mere fact that it might arise at subsequent stage of cause did not warrant removal. *Mills et al. v. Central R. R. of N. J.*, xvi. 491.

When main controversy is between citizens of same State and there is no controversy wholly between citizens of different States which can be fully determined between them, cause cannot be removed to United States court. *Mills et al. v. Central R. R. of N. J.*, xvi. 491.

When United States Supreme Court remands case to circuit court, it cannot prescribe what amendments to pleadings shall be allowed. Circuit court has full authority in the premises. *Branson v. Oregonian R. Co.*, xvi. 517.

When statute abolishes quo warranto proceedings and substitutes action to same effect, such action may be removed to U. S. circuit court, when other circumstances warrant removal. *Ames v. Kansas ex rel.*, xvi. 522.

Suit by State against one of its corporations for relinquishing powers to another corporation with which it has been consolidated under laws of U. S., and

UNITED STATES COURTS—Continued.

proceedings against directors of consolidated corporation for usurping powers of State corporation are suits arising under U. S. laws and may be removed to U. S. courts. *Ames v. Kansas ex rel.*, xvi. 522.

The court declines to decide that Congress may not confer on inferior courts jurisdiction in cases where by constitution Supreme Court of U. S. has original jurisdiction. *Ames v. Kansas ex rel.*, xvi. 522.

Judiciary act of March 3, 1875, does not confer on U. S. circuit courts jurisdiction over cases where jurisdiction of Supreme Court is made exclusive by Sect. 687, Rev. Stat. U. S. *Ames v. Kansas ex rel.*, xvi. 522.

Suits cognizable in U. S. courts on account of nature of controversy and not required to be brought originally in U. S. Supreme Court may be removed into U. S. circuit courts irrespective of character of parties. *Ames v. Kansas ex rel.*, xvi. 522.

Act as to service of process in Oregon, when applied in U. S. courts must be construed as if word "county" read "district." *Lung Chung, Adm'r, v. Northern Pac. R. Co.*, xvi. 548.

USAGE.

See CUSTOM.

VENUE.

Upon motion for change of venue contra affidavits may be read. Court may then exercise its discretion, considering the whole evidence. Order is reviewable by appellate court. *Pittsburgh, W. & K. R. R. Co. v. Applegate & So* xvi. 440.

WAREHOUSEMAN.

Until bill of lading is signed and delivered, railroad company is only liable for goods left on its premises for transportation as a warehouseman. *Mo. Pac. Ry. Co. v. Douglass & Sons*, xvi. 98.

When agent knowingly receives salesman's samples as baggage, and upon arriving at their destination station master, not knowing what they are, agrees to hold them, company remains liable as warehouseman only. *Texas, etc., R. Co. v. Capps*, xvi. 118.

Party may recover from warehouseman value of grain belonging to him with interest, when same has been mixed with other grain of like quality and is destroyed by fire occasioned by negligence. *Arthur v. Chicago, R. I. & P. R. Co* xvi. 288.

WATER AND WATERCOURSES.

See FLOODS.

WINDOWS.

When passenger rests arm on window-sill wholly within car and by sudden collision arm is thrown out and broken, question of contributory negligence is for jury. *Germantown Pass. R. Co. v. Brophy*, xvi. 861.

When passenger sat with elbow out of window and same was struck by cord wood piled near track, *held*, that he was guilty of such contributory negligence as precluded recovery. *Dun v. Seaboard & Roanoke R. Co.*, xvi. 868.

Passenger by accident dropped valuable parcel out of open window. Conductor, though asked, refused to stop train until next station was reached. Parcel never was found. *Held* that company was not liable. *Henderson v. Louisville, etc., R. Co.*, xvi. 897.

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